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80-1285
No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CARL W. BROWN, - - - - - Petitioner

versus

EARL J. HARTLAGE, - - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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January 26, 1981

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QUESTIONS PRESENTED

1. Does Kentucky Revised Statute (KRS) 121.055, as interpreted by Kentucky courts in voiding Petitioner's election for a campaign promise to serve as a public official for a salary which is less than permitted, violate the guarantee of unencumbered political speech accorded by the First and Fourteenth Amendments to the Constition of the United States upon grounds of vagueness and overbreadth?
2. Is there a clear and present danger to a compelling state interest such as to warrant the censoring of political speech protected by the First and Fourteenth Amendments to the Constitution of the United States of sufficient magnitude as to void Petitioner's election where Petitioner made a campaign promise, retracted four days later, seventy-eight days prior to the election, to serve as a public official for less than permitted?
3. Have the Kentucky Courts in the voiding of Petitioner's election interpreted KRS 121.055 in such manner as to violate the guarantee of unencumbered political speech accorded by the First and Fourteenth Amendments to the Constitution of the United States, for a campaign promise to serve as a public official for a salary which is less than permitted, by creating artificial distinctions for different forms of political speech?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

CARL W. BROWN, - - - - - *Petitioner*

v.

EARL J. HARTLAGE, - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The Petitioner, Carl W. Brown ("Petitioner"), prays a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of Kentucky entered on August 8, 1980; a rehearing of which was denied by that Court on October 29, 1980. A Motion for Discretionary Review of this matter to the Supreme Court of Kentucky was denied by that Court on December 8, 1980.

OPINIONS BELOW

The final judgment and opinion of the Kentucky Court of Appeals (Kentucky's intermediate appellate court) entered on August 8, 1980, is not reported but appears in the Appendix hereto. App. A, p. 21. The denial of and the opinion upon the Petition for Rehearing to the Kentucky Court of Appeals entered on

October 29, 1980, is not reported but appears in the Appendix hereto. App. B, p. 30. The order denying Discretionary Review to the Supreme Court of Kentucky (Kentucky's highest appellate court) entered on December 8, 1980, is not reported but appears in the Appendix hereto. App. C, p. 33.

JURISDICTION

The final judgment and the opinion of the Kentucky Court of Appeals in this matter was entered on August 8, 1980. A seasonable Petition for Rehearing was denied on October 29, 1980, and a seasonable Motion for Discretionary Review to the Kentucky Supreme Court was denied on December 8, 1980. This Petition is filed within ninety (90) days of December 8, 1980 and of October 29, 1980. Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

- *United States Constitution*
  - *First Amendment:*

    "Congress shall make no law . . .; or abridge the freedom of speech; or of the press; . . .".
  - *Fourteenth Amendment, Section One:*

    ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

• State Statute in Question

•• *Kentucky Revised Statute (KRS) 121.055:*

"No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other things of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree, or make a contract with any person to vote for or support any particular individual, thing, or measure, in consideration for the vote or for the financial support of that person in any election, primary or nominating convention, and no person shall require that any candidate make such a promise, agreement or contract."

• *Notice Required*

The facial or interpretive constitutionality of KRS 121.055 is drawn into issue by this matter and pursuant to 28 U.S.C. §2403(b) and Rule 28.4(c) of the Rules of this Court this Petition for Writ of Certiorari has been served upon the Attorney General of the Commonwealth of Kentucky.

STATEMENT OF THE CASE

This matter is a request for relief from the final judgment of the Kentucky Court of Appeals, Kentucky's intermediate appellate court, from which the Supreme Court of Kentucky refused a Motion for Discretionary Review and thus, allowed the decision of such intermediate court to become the law of this case.

The matter at bar involved an election contest in Jefferson County, situs of the City of Louisville. Respondent Hartlage, an incumbent Commissioner[1] of Jefferson County, Kentucky, was defeated for such office by the Petitioner in the November 6, 1979 election by a plurality of 10,151 votes.

Hartlage sued in the Jefferson Circuit Court to void the election. He alleged that Petitioner, and Petitioner's running mate for the office of Jefferson County Commissioner, Dr. Bill Creech ("Creech"), had made a public statement which violated KRS 121.055. App. G, p. 50. This was denied in Petitioner's Answer, and Federal constitutional issues were raised. App. H, p. 53.

Petitioner and Creech in an August 15, 1979 press conference stated that Respondent had increased the County Commissioner's salary to $20,000.00 per annum during his incumbency and had created a new position of Executive Assistant to all County Commissioners at a cost of $34,000.00 per annum. Petitioner and Creech criticized the substantial increase in the cost of operation of the Jefferson County Commissioners' Office during Respondent's term, pledged to reduce their salaries by $3,000.00 per annum each and reorganize the Commissioner's Office for a total annual savings to the taxpayers of $172,000.00 during the term of office they sought. App. I, p. 59.

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[1]In Kentucky, the office of County Commissioner is elective. KRS 67.040. App. E, p. 45. In Jefferson County, Kentucky, there are three such Commissioners who with the County Judge/Executive form the legislative branch of County government. KRS 67.083. App. F, p. 46.

Four days later, on August 19, 1979, the statements were fully retracted by the Petitioner and Creech at another press conference. App. J, p. 62.

In the election on November 6, 1979, Petitioner defeated Respondent by a plurality of 10,151 votes. *Creech was defeated.*

Respondent filed his Petition to void Petitioner's election on December 4, 1979. The matter was tried before the Jefferson Circuit Court in a bench trial on January 29, and 30, 1980. The trial court observed, inter alia, that after the retraction of August 19, 1979, Petitioner never again stated that he would reduce his salary as Commissioner. The trial court noted that during the remainder of the campaign, Respondent[2] directly questioned Petitioner as to the salary reduction statements and Petitioner repeated his retraction of August 19, 1979. App. D, p. 37.

The trial court upon reviewing the whole record, found that based upon:

> ". . . (1) the almost immediate retraction by Brown; (2) no subsequent retreat by Brown from the retraction; (3) balancing the violation against the disenfranchisement of thousands of votes; (4) the presumption of the people on the election process; and (5) the defeat of Dr. Creech, Brown's running mate, who had made the same statements

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[2]The trial court found Respondent had himself violated at least one provision of the Kentucky Corrupt Practices Act, but held such violation de minimis non curat lex.

in the same county-wide election; . . . Brown was fairly elected." App. D, p. 41.

The trial court in reliance upon *Sparks* v. *Boggs*, Ky., 339 S. W. 2d 480 (1960), found a violation of KRS 121.055 and held the Petitioner's statement was an unlawful promise to the electorate; but, despite the rationale of *Sparks*, Petitioner was fairly elected. Court costs were assessed against the Petitioner.

Respondent appealed to the Kentucky Court of Appeals which held that the ruling of the trial court should be reversed pursuant to KRS 121.055 as interpreted by *Sparks* v. *Boggs, supra.*[3]

The Kentucky Court of Appeals also dismissed Petitioner's cross-appeal because of the failure of the Petitioner to file a supersedeas bond.[4] Judgment of the Court of Appeals was entered on August 8, 1980.

A seasonable Petition for Rehearing was filed with the Kentucky Court of Appeals. On October 29, 1980, the Petition for Rehearing was denied. The denial, however, was qualified by an opinion wherein the Court questioned its decision and its reliance upon *Sparks* v. *Boggs, supra,* as being unconstitutionally broad and

[3]KRS 121.055 is of 1974 vintage. *Sparks* was decided in 1960 under then KRS 123.040, the precursor of the current statute, which in working form was noted by the Kentucky Court of Appeals to be almost identical to the current statute.

[4]Although the Petitioner's cross-appeal was dismissed by the Kentucky Court of Appeals, the First and Fourteenth Amendment issues were raised by affirmative defense in Petitioner's answer, briefed to the Kentucky Court of Appeals and advanced to the Kentucky Supreme Court. Thus, these issues were not mooted by a dismissal of the cross-appeal.

an unconstitutional limitation on free speech. Further, the court invited direction from the Kentucky Supreme Court (Kentucky's highest appellate court) observing that the issue was one which should be resolved by a court which had the power to overturn or modify *Sparks*. App. B, p. 31.

Petitioner seasonably moved the Kentucky Supreme Court for Discretionary Review which was denied on December 8, 1980.[5] The issuance of the mandate was stayed by the Kentucky Court of Appeals until March 9, 1981, so that Petitioner could seek relief from this Court. App. M, p. 67 and App. N, p. 68. On December 16, 1980, Petitioner's Motion for Substitution of Counsel was granted. App. O, p. 69.

All Federal issues were appropriately and seasonably raised by Petitioner in his answer at the trial court level; App. H, p. 53, and at all stages of the appellate proceedings.

REASONS FOR GRANTING THE WRIT

I. The Interpretation and Application of KRS 121.055 by the Kentucky Courts Is Not in Accord With Previous First Amendment Decisions of This Court.

• *Political Speech Is a Fundamental First Amendment Right.*

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[5]Under Kentucky procedure, denial of a Petition for Discretionary Review by the Kentucky Supreme Court causes the mandate of the Kentucky Court of Appeals to be forthwith issued. Kentucky Rules of Civil Procedure ("KRCP") 76.30(2)(b), App. K, p. 64, unless a stay be granted by that court. KRCP 76.44. The maximum time for stay of mandate is ninety (90) days. KRCP 76.44(b), App. L, p. 66.

This Court defined political expressions and the protection to be afforded them in *Mills* v. *Alabama,* 384 U. S. 214 (1966), as:

> "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." pp. 218, 219.

See also: *First National Bank of Boston* v. *Bellotti,* 435 U. S. 765 (1978); *Buckley* v. *Valeo,* 424 U. S. 1 (1976); *Monitor Patriot Co.* v. *Roy,* 401 U. S. 265 (1971).

Not only may a candidate raise such deprivation upon his own behalf; the candidate may also raise the rights of his constitutents. See: *Bullock* v. *Carter,* 405 U. S. 134 (1972).

* * * * * * *

This Court has historically disallowed restraint upon speech where statutes and interpretations of statutes: (1) are vague and overbroad; (2) contain no judicial finding that there is a "clear and present danger" to a compelling state interest; and (3) create unreal distinctions between forms of political expression, based upon speech content or the speaker.

That the statements in issue here were political expressions is beyond cavil. The matter at bar contains elements of all three categories of disallowed restraint upon fundamental First Amendment rights.

II. The Kentucky Courts' Interpretation and Application of KRS 121.055 Is Vague and Overbroad.

• *The Interpretation of KRS 121.055 Is Impermissibly Vague and Overbroad.*

This Court, in both civil and criminal matters, has consistently held that a statute which mandates or prohibits action in terms so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application" violates the essentials of due process. *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391 (1926). The inherent danger of vagueness is magnified when its impact is upon political speech. In *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961), this Court teaches:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by a lawful means, an opportunity essential to the security of the republic, is a fundamental principle of our Constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit punishment for the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment." pp. 287, 288.

See also: *Colautti* v. *Franklin*, 439 U. S. 379 (1979); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Ashton* v. *Kentucky*, 384 U. S. 195 (1966); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964).

* * * * * * * *

In the matter at bar, the Petitioner's election was voided by the Kentucky courts for alleged violation of KRS 121.055. The Kentucky Court of Appeals relied heavily upo. *Sparks* v. *Boggs, supra.* In likening *Sparks* to the matter at bar it held that Petitioner's salary was fixed by law and therefore he could not legally reduce his salary. Therefore, his statement to do so was a promise to the taxpayers to "reduce pro tanto the amount of taxes each taxpayer must pay." App. A at p. 25. In reaching this decision, the Kentucky Court must have parsed the statute to read:

> "No candidate * * * shall promise * * * things of value * * * to any person * * * in consideration of a person's vote."

KRS 121.055 warns of nothing! There is no self-contained means in the statute by which a reader of common intelligence could judge its impact. It leaves a candidate in a position to either act at risk or not act at all and be deprived of Constitutional rights.

The Kentucky court did not address the issue of clarity head-on. Instead, it relied upon *Sparks* v. *Boggs, supra,* as giving notice to the Petitioner that this form of political expression has been held to be

violative of a statute similar to KRS 121.055, despite the fact that *Sparks* was decided fourteen years prior to the adoption of the current statute and was factually different from the matter at hand. In *Sparks,* the offending office-seekers offered to serve for $1.00 per year, which was interpreted as an offer of free service, and they offered to channel the savings to select groups in the community rather than apply the savings to the general fund for the benefit of all taxpayers, as was done here. Clearly, being aware of *Sparks* and that the precursor statute was operationally the same as the current statute is of no help. Common intelligence would dictate that there was no correlation between the unlawful conduct complained of in *Sparks* and the alleged unlawful conduct of the Petitioner.

It must follow then that KRS 121.055 is facially vague and overbroad and that the interpretation placed upon it by the Kentucky courts is also vague and overbroad.

III. The Kentucky Courts Have Not Applied the Clear and Present Danger Test Mandated by This Court.

• *In Areas of Restraint on Political Speech, This Court Mandates a Balancing of the Compelling State Interest Against the Clear and Present Danger to Such Interest.*

This Court has spoken upon a plethora of matters dealing with circumscription of advocacy of unlawful activity by means of speech and conduct. From its decisions, it has evolved the balancing mechanism of

"clear and present danger." The mere advocacy of unlawful conduct is insufficient for a state to create restraints upon First Amendment rights of speech. More is required. There must be a clear and present danger that the advocated unlawful conduct will conflict with the state's compelling interest in the area which the state seeks to regulate. The test has been used in numerous instances to protect First Amendment rights in varied fact situations. Thus, in *Thornhill* v. *Alabama,* 310 U. S. 88 (1940) and *Dejonge* v. *Oregon,* 299 U. S. 353 (1937), the test was used in labor organizational efforts; in *Monitor Patriot Co.* v. *Roy,* 401 U. S. 265 (1971), it was used in a criminal libel action; in *Communist Party of Indiana* v. *Whitcomb;* 414 U. S. 441 (1974) and *Baird* v. *State Bar of Arizona,* 401 U. S. 1 (1971), it was used in cases involving the advocacy of the violent overthrow of the government; and, in *Edwards* v. *South Carolina,* 372 U. S. 229 (1963) and *Garner* v. *Louisiana,* 368 U. S. 157 (1961) it was used to protect speech and conduct in civil rights demonstrations.

In practical application, this Court mandates that the state court discern whether actual facts exist which present a clear and present danger to the state's compelling interest.

In *Landmark Communications, Inc.* v. *Virginia,* 435 U. S. 829 (1978), the functions of the legislative and judical branches of government in creating and reviewing statutes impacting First Amendment rights were explained thus:

> "A Legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so, whether the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and the press would be subject to legislative definition and the function of the First Amendment as a check on Legislative power would be nullified." p. 844.

By the mandate of this Court, it is no longer permissible for a state court to impose sanctions simply because a state statute so requires where protected First Amendment speech is concerned. In short, the court is required to hear proof that the proscribed speech presents an imminent danger to the state's compelling interest of such magnitude as to warrant the circumscription of First Amendment rights.

* * * * * * * *

Assuming arguendo, Petitioner's statements were unlawful at the time they were made, the Kentucky Court of Appeals has still erred and has disregarded this Court's teachings as to the balancing of such statements against the compelling state interest—protection of the electoral process. There has been no inquiry as to the impact of the statements in issue upon that compelling interest. Statutory sanctions have been imposed—without more.

Petitioner's alleged illegal statement was made on August 15, 1979 and the retraction on August 19, 1979,

seventy-eight days prior to the election of November 6, 1979. The election resulted in a plurality of 10,151 votes for the Petitioner and a defeat for his running mate Creech, who had made the same statements. Throughout all proceedings in this matter, Petitioner maintained that even if his statement were unlawful, it was retracted in time to have no effect upon the election process which was the state's only compelling interest. The trial court agreed and declared Petitioner validly elected with findings that conclusively show that there was no clear and present danger to the state's compelling interest. App. J, p. 60.

The Kentucky Court of Appeals in direct contravention of this Court's holdings, refused to consider this evidence, announcing:

> "The other considerations of the trial court likewise have no applicability. As previously discussed in this opinion retraction of the illegal statement, and no retreat from the retraction is of no consequence under the law of the state; likewise, there is no authority to disregard a mandatory statute because of balancing the violation against disenfranchisement, presumption of will of the people and defeat of Brown's running mate who made the same statement. Neither can we agree that Brown was fairly elected in face of his violation of the Corrupt Practices Act." App. A, p. 27.

Such reasoning is unacceptable. The Kentucky Court of Appeals found the statute mandatory. Ipse dixit,

it voided Petitioner's election. However, under the rulings of this Court, the Kentucky Court of Appeals abdicated its responsibility to balance the compelling state interest against a clear and present danger to the integrity of the electoral process. The net effect of such abdication by the judicial branch of government to the legislative branch is a failure to utilize the First Amendment safeguards prescribed by this Court.

IV. The Kentucky Courts Create Artificial Distinctions as to the Legality of Different Forms of Political Speech Inconsistent With the Decisions of This Court.

• *The Interpretation Placed Upon the Statute Allows Some Forms of Political Speech and Not Others.*

This Court condemns artificial distinctions as to legality of political speech based upon subject matter. In *Police Department of Chicago* v. *Mosely,* 408 U. S. 92 (1972), the City, by Ordinance, attempted to restrict picketing in front of schools for any purpose other than labor disputes, this court in finding such a distinction objectionable, reasoned:

> "Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored and more controversial ideas. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas, and government must afford all points of view an equal opportunity to be heard'." p. 96.

See also: *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953) and *Niemotko* v. *Maryland*, 340 U. S. 268 (1951). Thus, this Court mandates the elimination of artificial distinction based upon content of speech.

* * * * * * * *

Literally read, KRS 121.055 prohibits any candidate from making any promise or offering anything of value to the electorate, either directly or indirectly, in consideration for votes. The Kentucky appellate courts now interpret the Petitioner's statement to reduce his salary as an offer to the general populous to reduce taxes. App. A, p. 25. The required logical extension of this concept is that any promise to reduce taxes by any candidate is a violation of the statute. Presumably, such an interpretation prevents any promise by any candidate to pare waste or seek other economies in government. This prohibition could also be directed to such items as increased services or increased benefits. We are constrained to the rhetorical inquiries: Would a commitment to increase aid to elderly violate the statute? Would a commitment to seek industry to create additional jobs violate the statute? Obviously then, by the literal interpretation of the statute adopted by the Kentucky appellate courts, no candidate for political office in the Commonwealth of Kentucky is privileged to make any promise as to any political or economic change his election to public office would bring.

We are sure that this Court will take judicial notice that since the enactment date of the statute

under scrutiny (1974), Kentucky has had numerous elections. Kentucky is no different than the remaining states of the Union. Its political process is viable and active. Elections involve fierce contests in which normal political promises are made by each candidate. However, now Kentucky holds that a promise to serve for less than is permitted is a promise to reduce taxes on a pro tanto basis and as such, is an unacceptable promise. But, promises to provide for good administrative services, encourage businesses to locate in Kentucky, provide aid for the elderly or jobs are presumably acceptable. Thus, by its decision in the matter at bar, Kentucky has established two standards of political speech—based upon the genre of the campaign promise.

This is an unacceptable distinction.

• *The Kentucky Courts Implicitly Interpret KRS 121.055 to Restrict Expression of a Candidate's Political Speech But Not the Political Speech of Others.*

This Court, in *First National Bank of Boston* v. *Belotti, supra,* recently protected the corporate right to engage in the political process, bottoming its reasoning upon the issue, not the speaker. There, this Court held:

> "If the speakers here were not corporations, no one would suggest that the state court silence their proposed speech. It is the type of speech indispensible to decision making in a democrary, and this is no less true because the speech comes from a corporation rather than an individual. The in-

herent worth of speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." p. 777.

Thus, we are taught that a distinction based upon the status of the speaker is an invalid distinction.

* * * * * * *

Here, implicit in the interpretation of the statute in issue by the Kentucky appellate courts, is that only candidates may not make promises to the electorate. There is no prohibition against citizens, citizen groups or other organizations who may or may not advocate the same ideas as candidates. Certainly, there are those banded together in political action groups advocating ideas such as economy in government, and other betterments to the common weal who are presumably privileged to speak. Thus, while a candidate in Kentucky may not be privileged to address the ideas advocated by any of the citizens groups, non-candidates may address such ideas with impunity. This is a distinction based upon the status of the speaker. In Kentucky, then, the inherent worth of the speech is dependent upon the identity of the source. The distinction is artificial!

Petitioner concedes that Kentucky has a substantial interest in protecting the integrity of the electoral process but urges that where the concepts advocated by special interest groups are protected and these same concepts advocated by candidates are proscribed, there

is an illusory difference. If a subject is a valid subject for discussion by one then it must be a valid subject for discussion by all. Any holding to the contrary is a distinction as to the source of the statement and is unconstitutional.

V. Kentucky Courts Have Decided an Important Issue of Federal Law Which Has Not Been Addressed by This Court.

• *This Is a Case of First Impression.*

This case presents to this Court an issue as to the assertion of a candidate's First Amendment right to address the public and the deprivation of this right by state statute as interpreted by a state court. This Court has not addressed this unique issue before. A subsidiary issue is that of the rights of the voting public. While this matter comes to this Court from Kentucky, it is not alone in its misperception of First Amendment rights. In 1940, Nebraska, in *State ex rel. Burkett* v. *Swanson,* 291 N. E. 481 (Neb., 1940), accorded with the current Kentucky position. However, in neither *Burkett,* nor *Sparks* v. *Boggs, supra,* both of which were relied upon by the Kentucky court, was the Federal constitutional guarantee of the First Amendment raised. This issue was raised in the matter at Bar and was decisionally ignored for the rationale contained in *Sparks,* although as Petitioner has earlier observed, the Kentucky Court of Appeals was not without some reservation. It felt that Petitioner's contention was not without logic or appeal and requested

the Kentucky Supreme Court to review the matter. App. B, p. 31.

Your Petitioner addressed the issue to the Kentucky Supreme Court which had the power to overturn or modify *Sparks* v. *Boggs, supra,* by a Motion for Discretionary Review. Such Motion was not granted by the Kentucky Supreme Court and it implicitly finds no fault with the decision of the Kentucky Court of Appeals.

Accordingly, Petitioner urges that if the issue is to be put to rest, and Petitioner's First Amendment rights vindicated, it must be done here.

CONCLUSION

For any one or all of the reasons hereinabove set forth, minimally, a Writ of Certiorari should be granted by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION RENDERED: AUGUST 8, 1980; 10:00 A.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 80-CA-385-MR

EARL J. HARTLAGE - - - - - - *Appellant*

v.

CARL W. BROWN - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Michael O. McDonald, Judge
Action No. 79-CI-11292

REVERSING

BEFORE: VANCE, HOGGE and GUDGEL, Judges.

HOGGE, JUDGE: On November 6, 1979, Carl W. Brown defeated Earl J. Hartlage in an election for Jefferson County Commissioner for the C-District. Hartlage contested the election of Brown on the grounds of a public statement made by Brown and his running mate, Dr. Bill Creech, which he alleged violated the Kentucky Corrupt Practices Act. Brown and Creech had stated at a televised press conference on August 15, 1979 that they intended to cut their own salaries by $3,000.00 per year if elected. In an August 19, 1979 news conference, after being alerted to possible legal questions, they retracted the statement. Hartlage contended that the statement violated KRS 121.055. The Jefferson Circuit Court, although finding a violation of this section of the Corrupt Practices Act, adjudged

pursuant to KRS 120.165(4) that Brown had been fairly elected and refused to void the election. Hartlage appeals. A cross-appeal filed by Brown has been dismissed by reason of his failure to file a supersedeas bond.

The trial court found that Brown violated KRS 121.055. KRS 121.055 provides:

> No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contract with any person to vote for or support any particular individual, thing or measure, in consideration for the vote or the financial or moral support of that person in any election, primary or nominating convention, and no person shall demand that any candidate make such a promise, agreement or contract.

The appellee, by his brief and oral argument, insists that the trial court erred in this holding and also its holding that the appellant could maintain this contest action as appellant himself, "violated certain provisions of the Corrupt Practice Act." Both these arguments appear to be matters to be considered on cross-appeal, which has previously been dismissed in this case by this court. Be that as it may, we agree with the finding of the trial court that all the defenses raised by the appellee "failed to block Hartlage from asserting the claim in the Petition either legally or equitably." The appellee either failed to prove his asserted defenses, or there had been substantial compliance or the violation, if any, was "de minimis."

Appellee contends that the trial court erred in determining that Brown had violated KRS 121.055. He relies

on *Owsley* v. *Hill*, 210 Ky. 285, 275 S. W. 797 (1925). In that case Hill, a candidate for county attorney, proposed to have the fiscal court reduce the salary of the office by $400.00, and to have the court allot that sum to the county road fund. (The salary for the term of office for which Hill was campaigning had not been set in the manner required by law.) In that case, the statement was held not to be a violation of the Corrupt Practices Act.

After the decision in *Owsley* v. *Hill, supra*, the court interpreted KRS 123.040, a statute with wording almost identical to KRS 121.055, in *Sparks* v. *Boggs*, Ky., 339 S. W. 2d 480, 484 (1960). In that case, it was held that a promise by candidates for the office of city commissioner, whose salaries were fixed by statute, to serve for $1.00 per year and to vote to have the $2,000.00 savings to be distributed to specified religious, educational, charitable and recreational programs violated the Corrupt Practices Act. The election was held to be void. The court explained its holding as follows:

> It appears to us there can be no escape from the conclusion that a promise to take a reduction in the salary set by law for an elective public office, or an agreement to discharge the duties of the office gratis, advanced by one to induce votes for his candidacy, is so vicious in its tendency as to consitute a violation of the Corrupt Practices Act. To hold otherwise would permit the various elective public offices to become filled by those who would purchase their election thereto by making the most extravagant bid. The auction method of choosing a public officer would supplant the personal fitness test. Eventually most of the public offices would be occupied by the opulent, who could afford to serve without pay, or by the ambitious, who would serve only for the pittance of honor attached

> to the office, or by the designing grafter, who would surely obtain his remuneration by methods which would not bear scrutiny. Under such a system good government would certainly vanish from every subdivision of the state.

In *Sparks* v. *Boggs*, the court explained the distinction between that case and *Owsley* v. *Hill, supra*, which resulted in a different disposition of the litigation:

> *The material difference* between the case of *Owsley* v. *Hill*, and the one at bar is that the annual salary of a commissioner for Hazard *had already been fixed by law* for the new term, whereas such had not been done in respect to the county attorney's office in controversy in *Owley* v. *Hill*.
>
> . . . .
>
> As their rate of pay had already been legally fixed at $500 per year, the amount of salary they were entitled to receive upon taking office could not be altered. Section 161 of the Constitution of Kentucky plainly prohibited such contemplated action npon their part. The pertinent language of that section reads: "The compensation of any city, county, town, or municipal officer shall not be changed after his election or appointment; or during his term of office; * * *." The word "changed" implies that the compensation of an official may not be scaled up or scaled down. See also Section 235 of the Constitution of Kentucky. In view of the quoted constitutional inhibition, appellees gave out to the electorate a pledge they could not abide by. . . . [Emphasis added.]

It is quite apparent that the salary for this office was, like the salary in *Sparks* v. *Boggs*, fixed by law. KRS

64.530(4) states that salaries for county officers elected by popular vote shall be set by the fiscal court "not later than the first Monday in May in the year in which the officers are elected, and the compensation of the officer shall not be changed during the term. . . ." Brown promised to do an act that he could not legally do. Further, his statement was a promise to the taxpayers to reduce pro tanto the amount of taxes each taxpayer must pay. It is stated in *Sparks* v. *Boggs, supra:*

> The general rule on the question before us is thus stated in 43 Am. Jur., Public Officers, sec. 374, p. 159: "An agreement by a candidate for office that if chosen he will discharge the duties of the office without compensation or for a lesser compensation than that provided by law, or will pay part of his salary into the public treasury, is illegal, whether made in good faith or not. The underlying principle of the decisions (on this point) is that when a candidate offers to discharge the duties of an elective office for less than the salary fixed by law, a salary which must be paid by taxation, he offers to reduce pro tanto the amount of taxes each indivdiual taxpayer must pay, and thus makes an offer to the voter of pecuniary gain.
>
> It appears to us there can be no escape from the conclusion that a promise to take a reduction in the salary set by law for an elective public office, or an agreement to discharge the duties of the office gratis, advanced by one to induce votes for his candidacy, is so vicious in its tendency as to constitute a violation of the Corrupt Practices Act.

It is clear that although Brown may have acted in good faith the trial court correctly held he had in fact violated the Corrupt Practices Act. Under this statute and our case

law, this court cannot reach any conclusion other than the appellee violated KRS 121.055.

What was the effect of that violation? KRS 120.015 provides that in contest actions, where it is alleged that the provisions of KRS 121.055 were violated, and upon trial it appears that the provisions have been violated by the contestee or by others in his behalf with his knowledge, *the nomination or election of the contestee shall be declared void.* Violations of the Corrupt Practices Act through promises similar to the one made by Brown resulted in voiding of elections in *Draughn* v. *Martin,* Ky., 350 S. W. 2d 161 (1961); *Sparks, supra,* and *Kluemper* v. *Zimmer,* 240 Ky. 225, 41 S. W. 2d 111 (1931). We find no exception in the statute where the statement is retracted, nor do we find any Kentucky case indicating that retraction is a defense. Although the retraction received similar publicity, there is no way of knowing whether it reached the same members of the voting public who heard the original statement. In litigation initiated to compel the Nebraska Secretary of State to accept one Burkett's filing as a candidate, the Supreme Court of Nebraska held that Burkett should not be on the ballot in spite of his offer to repudiate a statement that he would serve without pay so long as the budget remained unbalanced. *State ex rel. Burkett* v. *Swanson,* 291 N. W. 481 (Neb. 1940). We hold that the retraction did not constitute a defense.

The trial court held, and appellee insists, that KRS 120.165(4) is inconsistent with KRS 120.015 and applying KRS 120.165(4) after reviewing the whole record, Brown was fairly elected and KRS 120.165(4) overcomes the mandatory application of KRS 120.015.

These conclusions and holding are clearly erroneous. KRS 120.165(4) has no applicability to this action as this contest was brought under and tried under KRS 120.015. This latter statute specifically treats the violation of the

Corrupt Practices Act, charged herein, viz. KRS 121.055. As between legislation of broad and general nature and legislation dealing minutely with specific matter on the other hand, the specific prevails over the general. *City of Bowling Green* v. *Board of Education of Bowling Green Independent School District,* Ky., 443 S. W. 2d 243, 247 (1969). If there is any inconsistency, which we fail to find, then the inconsistency must be resolved in favor of the specific statute, KRS 120.015, which mandatorily requires voiding of an election where KRS 121.055 is violated by the contestee.

The other considerations of the trial court likewise, have no applicability. As previously discussed in this opinion, retraction of the illegal statement, and no retreat from the retraction, is of no consequence under the law of this state; likewise there is no authority to disregard a mandatory statute because of balancing the violation against disenfranchisement, presumption of will of the people and defeat of Brown's running mate who made the same statements. Neither can we agree that Brown was fairly elected in face of his violation of the Corrupt Practice Act.

The law and courts look with disfavor on disfranchisement and this is very true in this case. Although considerations of good faith and balancing of rights may be proper in a contest under KRS 120.165(4), they have no applicability here because, as already pointed out, this action bas based on violation of KRS 121.055, one of the specifically identified prohibited acts under KRS 120.015. There is no authority under this section to entertain such defenses. The only result the court can adjudge is to void this election and to hold otherwise is error. *Sparks* v. *Boggs, supra; Brewer* v. *Compton,* Ky., 122 S. W. 2d 1024 (1938).

The final question for consideration is whether Brown's statement is protected by the United States Constitution. To hold that promises to serve at reduced compensation in violation of the Corrupt Practices Act are immune from regulation in view of the provisions of the United States Constitution is to open the door to arguments that other statements in violation of the Corrupt Practices Act are protected because they involve speech and self-expression.

> Constitutional rights of liberty of speech and of the press are subject to such reasonable regulations as are necessary to promote and preserve public welfare. The preferred position of freedom of speech does not require legislators to be insensible to claims by citizens to comfort and convenience. A state may punish those who abuse the constitutional freedom of speech by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace. 16 Am. Jur. 2d *Constitutional Law* §409.
>
> It is well settled that the rights of free speech and press are subject to legislative restriction, within proper limits. The First Amendment does not forbid a regulation which ends in no restraint upon expression or in any other evil outlawed by the Amendment's terms and purposes. It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. And the prohibition of legislation against free speech is not intended to give immunity for every use or abuse of language, the right of free speech and press does not prevent the punishment of those who abuse this freedom, and does not imply the right to paralyze the means for effective protection of all the freedoms

secured by the Bill of Rights, nor the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all depends. 16 Am. Jur. 2d *Constitutional Law* §507.

We hold that the statement was not constitutionally protected.

The judgment is reversed with directions to enter a new judgment voiding the appellee's election.

ALL CONCUR.

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APPENDIX B

OPINION RENDERED: OCTOBER 29, 1980
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 80-CA-385-MR

EARL J. HARTLAGE - - - - - - *Appellant*

v.

CARL W. BROWN - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Michael O. McDonald, Judge
Action No. 79-CI-11292

OPINION AND ORDER DENYING PETITION FOR REHEARING—Entered October 29, 1980

BEFORE: HOGGE, GUDGEL and VANCE, Judges.

GUDGEL, JUDGE. In his Petition for Rehearing the appellee contends that this Court has misconceived fifth amendment freedom of speech issues and overlooked recent decisions of the United States Supreme Court applicable thereto. Specifically, appellee relies upon *Consolidated Edison Co.* v. *Public Service Commission*, ____ U. S. ____, 48 USLW 4776 (June 20, 1980); *First National Bank* v. *Bellotti*, 435 U. S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978); and *Buckley* v. *Valeo*, 424 U. S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), none of which were cited to this Court in his original brief.

The cases relied upon by appellant are not controlling when applied to the factual situation which is present in this case. Without question a state may not censor what a candidate for public office may say to the electorate. There is a compelling state interest, however, in the fairness and integrity of elections, and a state may require that elections be conducted free of corruption and bribery.

Our state has defined by statute what constitutes corruption in an election. It condemns an attempt to buy votes. Our highest court has specifically held that a promise by a candidate to take a reduction in the salary set by law for an elective office and a promise to discharge the duties of the office without pay is so vicious in its tendencies as to constitute a violation of the Corrupt Practices Act. The court's reasoning is premised on the belief that such a promise is an attempt to buy votes or to bribe the voters. *Sparks* v. *Boggs*, Ky., 339 S. W. 2d 480 (1960). We are bound by that decision. The refusal of this Court to follow precedent established by our Supreme Court would constitute nothing less than judicial anarchy.

The cases relied upon by appellee do not hold, and appellee does not go so far as to argue, that a state does not have a constitutional right to void an election for bribery simply because the offer of the bribe involved the use of speech. What appellee really argues is that the holding of *Sparks* v. *Boggs, supra*, is unconstitutionally broad for the reason that a holding in 1980 that a promise to serve in office at reduced pay can be equated with vote buying is an unconstitutional limitation on the freedom of speech. If carried to its logical extreme, he contends, any promise by a candidate to increase the efficiency and thus lower the cost of government might likewise be considered as an attempt to buy votes. This contention is not without logic or appeal, but since it strikes at the heart of *Sparks* v.

Boggs, supra, it must be addressed to a court which has the power to overturn or modify that decision.

The Petition for Rehearing is DENIED.

ALL CONCUR.

/s/ Paul D. Gudgel
Judge, Court of Appeals

ENTERED: October 29, 1980

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APPENDIX C

SUPREME COURT OF KENTUCKY

80-SC-770-D
(80-CA-385-MR)

CARL W. BROWN - - - - - - - *Movant*

v.

EARL J. HARTLAGE - - - - - *Respondent*

Jefferson Circuit Court
No. 79-CI-11292

ORDER DENYING DISCRETIONARY REVIEW—
Entered December 9, 1980

The motion of Carl W. Brown for a review of the decision of the Court of Appeals is denied.

Palmore, C. J., and Aker, Clayton, Lukowsky, and Stephenson, JJ., sitting. All concur.

ENTERED: December 9, 1980.

/s/ John S. Palmore
Chief Justice

APPENDIX D

JEFFERSON CIRCUIT COURT

SEVENTH DIVISION

No. 79CI11292

EARL J. HARTLAGE - - - - - - - *Plaintiff*

v.

CARL W. BROWN - - - - - - - *Defendant*

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND OPINION

This case was tried, pursuant to KRS 120.165, on January 29 and 30, 1980, without a jury, and is of record.

On December 4, 1979, the plaintiff-contestant, Earl J. Hartlage, filed a petition against the defendant-contestee, Carl W. Brown, alleging that Brown violated the Kentucky Corrupt Practices Act, specifically, KRS 121.055. Because of the violation, Hartlage demands that Brown's election to the office of Jefferson County Commissioner, "C" District, be voided, and the office vacated by Brown. (KRS 120.155 restricts the filing of a suit over a contest of a regular election to any candidate, provided that the candidate obtained not less than 25% of the votes cast for the successful candidate. *Dietz* v. *Zimmer,* 231 Ky. 546, 21 S. W. 2d 999 limits the suit for bringing the action to a defeated candidate.)

Both Hartlage and Brown were their respective party's nominees for the office in question from "C" District. "C" District encompasses an area generally referred to as the

southwest portion of Jefferson County, Kentucky. Hartlage was the Democratic nominee, and Brown, the Republican.

In the general election of November 6, 1979, Brown defeated Hartlage, the incumbent, by 10,151 votes. The candidates were voted for by the County-wide electorate; however, their primary races were confined to their respective district.

During the regular election campaign, on August 15, 1979, Brown, along with Dr. Bill Creech, "B" District Republican candidate, held a televised press conference and made the following statements:

Mr. Brown: ". . . with state law limiting their authority and responsibility (referring to County Commissioners) to legislation (KRS 67.080), it is clear that their jobs are simply not worth $20,000 a year each. It is ludicrous that part-time Commissioners nevertheless see fit to pay themselves the same amount as that paid the full-time County Judge. The mere fact that state law allows such outrageous levels of remuneration does not in itself justify these payments."

". . . using the gray fringes of the law for his own personal gain, Hartlage led the move to funnel County tax dollars into Commissioners' pockets."

Brown, during the same conference, supported and acquiesced in the following statement of Dr. Bill Creech:

Dr. Creech: "We abhor the Commissioners' outrageous salaries, and to prove the strength of our convictions, one of our first official acts as County Commissioners will be to lower our salary to a more realistic level. We will lower our salaries, saving the taxpayers $36,000 during our first term of office, by $3,000 each per year."

Later in the conference Brown went on to say, "These 2 proposals—cutting our own salaries and reorganizing the

Commissioners' office staff will save the taxpayers over $172,000 during our first term of office."

The Sunday after the press conference, a friend of Brown called to inform him that he may have violated the Corrupt Practices Act by making the statements mentioned in the press conference. Brown, a lawyer, personally researched the matter and concluded that a valid question could be raised on the statements as to whether they were violations. A retraction by Brown and Creech was made at a televised press conference on August 19, 1979. Partial statements are as follows:

"We are men enough to admit when we've made a mistake. We have discovered that there are Kentucky Court decisions . . . which indicate that our pledge to reduce our salaries, if elected, may be illegal." ". . . we do hereby rescind our pledge to reduce the County Commissioner's salary, if elected, and instead, pledge to seek corrective legislation in the next session of the general assembly, to correct this silly provision of state law."

The Court will judicially note that Dr. Bill Creech was defeated by Jim "Pop" Malone in the regular election for "B" District Commissioner.

There is no Kentucky case law concerning the effect, if any, of a repudiation or retraction of this type pledge or promise to the public. However, a Nebraska case, *State ex rel. Burkett* v. *Swanson*, 291 N. W. 481 (1940) stands for the proposition that a withdrawal of a statement of this nature cannot be treated as a defense, but this precedent is not binding upon the Court.

The Court will comment on the retraction and repudiation of the offer to reduce the salary. The retraction press conference of August 19, 1979, when reviewed, was not that of a remorseful penitent. The retraction statement did not admit a violation, or that the statements were violations,

but that the statements raised a reasonable question of violation as a result of silly law. The retraction accused the branches of government of being in cahoot with one another and scratching one another's back. Brown and Creech further said that if there was a violation in what was said, Hartlage caused the violation by doubling his salary after his previous election.

The Petition further alleged that Brown made other statements in public concerning the salary reduction pledge; however, the Court finds no substance to this allegation. The evidence is plain that whenever the issue was discussed again, it was repudiated, and when it was discussed, the matter in controversy was put to Brown either by Mr. Hartlage at subsequent meetings of candidates, or by persons from an audience in a public forum. The evidence reveals no retreat by Brown from the retraction and repudiation that was publicly made August 19, 1979.

Brown, by his response to this action, offered various defenses to the allegation in the Petition. He admitted the statements were made on August 15, 1979. He asserts that the reduction in salary is within the confines of prescribed law; that there was no claim to serve without compensation, but contends the salary should be consistent with the duties of the office, which would dictate a reduction in salary; that Hartlage has no standing to bring the suit because he violated the Corrupt Practices Act himself, under KRS 120.-155, and therefore, the equitable doctrine of "clean hands" would apply and deny Hartlage's right to contest this election. Brown further contended that the retraction of August 19, 1979, cured any violation, if one existed.

The Court finds the defense is without substance. It was alleged that Hartlage made an agreement, contrary to law, with the Greater Louisville Central Labor Council, and with the Department of Human Services Employees Association for his endorsement in the election. The alleged

agreement concerned a commitment by Mr. Hartlage over collective bargaining rights for governmental employees. Actually, the evidence was to the contrary. It's also alleged that Hartlage failed to make election finance disclosures in a proper way by not filing the reports with the County Clerk, although the reports had been filed with the Registry. This was found to exist but was cured within a reasonable time after it was discovered, and the law was complied with. Therefore, the Court finds substantial compliance on this point. (See *Roberts* v. *Byrd,* 344 S. W. 2d 378 (1961).)

The only violation of Hartlage, about which Brown complains, really worth comment is the failure of Hartlage to have the disclaimer on his campaign locomotive. But this violation is so insignificant it does not reach the dignity of precluding Hartlage from bringing this suit. This violation is found by the Court to be *de minimis.*

In all, the defenses raised fail to block Hartlage from asserting the claim in the Petition either legally or equitably.

Therefore, one issue now before the Court is whether the pledge of Brown, in the statement of August 15, 1979, is a violation of the Corrupt Practices Act.

KRS 121.055 states as follows:

> *Candidates prohibited from making expenditure or loan, or agreement as to action when elected, to secure vote or support.*—No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contract with any person to vote for or support any particular individual, thing or measure, in con-

sideration for the vote or the financial or moral support of that person in any election, primary or nominating convention, and no person shall demand that any candidate make such a promise, agreement or contract.

The Court answers the above question in the affirmative. *Sparks* v. *Boggs*, 339 S. W. 2d 480 (1960), is explicit on this point. It states, "It appears to us there can be no escape from the conclusion that a promise to take a reduction in salary set by law for an elected public office . . . advanced by one to induce votes for his candidacy, is so vicious in its tendency as to constitute a violation of the Corrupt Practices Act."

This leads us to the question as to whether the Commissioner's salary, as mentioned by Brown in his pledge, was set by law. There is no question in the Court's mind concerning this issue either, and the Court finds that the Commissioner's salary was set by law. KRS 64.530(5) fixes the monthly compensation of County officers elected by popular vote. The Commissioners are therein included. Further, KRS 64.527 permits the equating of Commissioners' salaries to present value of the purchasing dollar, or adjusting the compensation based upon the "rubber dollar" theory. To otherwise find would require manipulation of the law by legal gymnastics which this Court is unable to perform.

So, the Court having found there was a promise to reduce Brown's salary as set by law, it naturally follows there was a violation of the Corrupt Practices Act, specifically, KRS 121.055, and this finding is in compliance with the rationale of *Sparks* v. *Boggs, supra.*

Now, the question is whether the election of Brown should be voided and his office vacated. Hartlage argues that it's an automatic voiding of the election and vacating

of the office if a violation of this nature is found to exist. The cases cited refer to this type of promise as a bribery, and the only remedy, according to Hartlage, is the relief demanded by his Petition. Hartlage is not without legal support in that KRS 120.015 states that if a violation occurs the election shall be declared void.

The Court generally agrees with Hartlage except for the end result. The Court does not adjudge that the election should be voided and the office vacated. The Court's explanation is as follows:

There is reasoning given to us in *Owsley* v. *Hill*, 275 S. W. 797 (1925), that if the promise to reduce salary is made to the public at large, there is no violation. All other cases cited were promises of a reduction in salary for the benefit of specific groups and to accomplish a particular purpose. The beneficiaries in those cases included widows and orphans, religious groups, retarded children, Little League baseball, the hiring of a city manager, and so forth. In *Owsley* the candidate promised to reduce to a previously fixed sum and transfer the savings to a road fund for the County. Our highest Court said, "We cannot feel that this statute refers to promises made the entire people, and to hold otherwise would prevent any candidate from pledging himself to support measures designed to correct evils of which the people were complaining."

The *Sparks* case, however, appears to overrule *Owsley*, so it is inescapable to conclude that a violation of the Corrupt Practices Act did not occur. But the Court resists the proposition that automatic voiding of the election must necessarily follow because the Court further concludes that the law requires more.

KRS 120.165(4) states:

> If it appears from an inspection of the whole record that there has been such . . ., *bribery* . . . in the

> conduct of the election that neither contestant nor contestee can be judged to have been fairly elected, the Circuit Court . . ., may adjudge that there has been no election.

The Court is led to believe that this statutory provision is inconsistent with KRS 120.015. KRS 120.165(4) speaks of bribery and the *Sparks* case and *Kluemper* v. *Zimmer*, 41 S. W. 2d 1115 (1931), declare these promises to be bribery. Applying KRS 120.165(4) further, and reviewing the whole record, considering the following:

1) the almost immediate retraction, by Brown;
2) no subsequent retreat by Brown from the retraction;
3) balancing the violation against disenfranchisement of thousands of votes;
4) the presumption of the will of the people in the election process; and
5) the defeat of Dr. Creech, Brown's running mate, who had made the same statements in the same county-wide election;

the Court adjudges, pursuant to KRS 120.165(4), that Brown was fairly elected. KRS 120.165(4) overcomes the mandatory application of KRS 120.015.

Previously, the Court faintly criticized Brown for saying the law is silly. Therefore, the Court will refer to the law as unique when the Court tries to grasp the reasoning of the legislature in these statutes. Under KRS 120.015, and since only a defeated candidate may file suit to contest the election, and further conditioned upon the defeated candidate obtaining 25% of the successful candidate's votes cast, if the successful candidate's promise is big enough, and the defeat is resounding enough, then there can be no contest over the violation.

Therefore, in keeping with the seriousness of the matter as the law so clearly requires, the defendant-contestee, Brown, is adjudged to have violated KRS 121.055; however, for the reasons above stated, his election is not voided. Further, in keeping with the seriousness of the condemnation of his campaign promise, the costs of this action shall be taxed against him. Either counsel may prepare judgment consistent herewith, with notice to opposing counsel.

/s/ Michael O. McDonald
Judge

Date:

cc: Victor L. Baltzell, Jr.
Richard D. Remmers

JEFFERSON CIRCUIT COURT

DIVISION SEVEN

No. 79-CI-11292

EARL J. HARTLAGE - - - - - - - - *Plaintiff*

v.

CARL BROWN - - - - - - - - *Defendant*

JUDGMENT

This cause having come on for a hearing before the Court, arguments for the Plaintiff and the Defendant having been fully presented, and the Court having entered its findings of fact and conclusions of law and opinion on February 6, 1980,

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. The findings of fact and conclusions of law and opinion entered on February 6, 1980, are incorporated herein by reference as if set out verbatim herein;

2. The relief sought in the petition is denied;

3. The election of Carl W. Brown as Commissioner of the Jefferson County Fiscal Court from C District, Jefferson County, Kentucky, is upheld;

4. The Defendant, Carl W. Brown, shall pay the costs of this action;

5. That pursuant to CR 54.02 this is a final and appealable order and there is no just reason for delay in its entry or execution.

/s/ Michael O. McDonald
Judge

Date: February 12, 1980

Tendered by:

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APPENDIX E

FISCAL COURTS

67.040. Fiscal Court—Members—Presiding Officer—Deadlock.—(1) The fiscal court of each county shall consist of the county judge/executive and the justices of the peace of the county; or of the county judge/executive and three (3) county commissioners elected under KRS 67.050 and 67.060.

(2) The county judge/executive shall preside, if present. A majority of the justices of the peace or commissioners shall elect one (1) of their number to preside during the absence or inability of the county judge/executive to preside. If any person fails to comply with a lawful order of the fiscal court, the circuit court, on application of the county judge/executive, may compel obedience by proceedings for contempt.

(3) When there is a tie vote in the fiscal court in the selection of any officer or employe to be selected by the fiscal court, and a deadlock results and continues for fifteen (15) days or longer, the county judge/executive shall cause to be entered upon the minutes of the fiscal court an order reciting the facts as to the deadlock, and the question upon which it has occurred and exists, and thereupon, the county judge/executive shall make such appointment. (1833, 1836, 1837: amend. Acts 1942, ch. 173, §§ 1, 2; 1952, ch. 224, §1; 1976 (Ex. Sess.), ch. 20, § 6, effective January 2, 1978; 1978, ch. 118, §7, effective June 17, 1978; 1978, ch. 384, § 141, effective June 17, 1978.)

APPENDIX F

67.083. Additional Powers of Fiscal Courts.—(1) It is the purpose of this section to provide counties as units of general purpose local government with the necessary latitude and flexibility to provide and finance various governmental services within those functional areas specified in subsection (3) of this section, while the general assembly retains full authority to prescribe and limit by statute local governmental activities when it deems such action necessary.

(2) The fiscal court of any county is hereby authorized to levy all taxes not in conflict with the Constitution and statutes of this state now or hereafter enacted.

(3) The fiscal court shall have the power to carry out governmental functions necessary for the operation of the county. Except as otherwise provided by statute or the Kentucky Constitution, the fiscal court of any county may enact ordinances, issue regulations, levy taxes, issue bonds, appropriate funds and employ personnel in performance of the following public functions:

(a) Control of animals, and abatement of public nuisances;

(b) Regulation of public gatherings;

(c) Public sanitation and vector control;

(d) Provision of hospitals, ambulance service, programs for the health and welfare of the aging and juveniles, and other public health facilities and services;

(e) Provision of corrections facilities and services, and programs for the confinement, care and rehabilitation of juvenile law offenders;

(f) Provision of parks, nature preserves, swimming pools, recreation areas, libraries, museums and other recreational and cultural facilities and programs;

(g) Provision of cemeteries and memorials;

(h) Conservation, preservation and enhancement of natural resources including soils, water, air, vegetation and wildlife;

(i) Control of floods;

(j) Causing the repair or demolition of structures which present a hazard to public health, safety or morals or are otherwise inimical to the welfare of residents of the county; causing the redevelopment of housing and related commercial, industrial and service facilities in urban or rural areas; providing education and counseling services and technical assistance to present and future residents of publicly assisted housing;

(k) Planning, zoning and subdivision control according to the provisions of KRS Chapter 100;

(l) Adoption, by reference or in full, of technical codes governing new construction, renovation or maintenance of structures intended for human occupancy;

(m) Regulation of commerce for the protection and convenience of the public;

(n) Regulation of the sale of alcoholic beverages according to the provisions of KRS Chapters 241 through 244;

(o) Exclusive management of solid wastes by ordinance or contract or by both and disposition of abandoned vehicles;

(p) Provision of public buildings, including armories, necessary for the effective delivery of public services;

(q) Cooperation with other units of government and private agencies for the provision of public services, including but not limited to training, educational services and cooperative extension service programs;

(r) Provision of water and sewage and garbage disposal service but not gas or electricity; including management of onsite sewage disposal systems;

(s) Licensing or franchising of cable television;

(t) Provision of streets and roads, bridges, tunnels and related facilities, elimination of grade crossings, provision of parking facilities, enforcement of traffic and parking regulations;

(u) Provision of police and fire protection;

(v) Regulation of taxis, buses and other passenger vehicles for hire;

(w) Provision and operation of air, rail and bus terminals, port facilities, and public transportation systems;

(x) Promotion of economic development of the county, directly or in cooperation with public or private agencies, including the provision of access roads, land and buildings, and promotion of tourism and conventions;

(y) Preservation of historic structures.

(4) The county judge/executive is hereby authorized and empowered to exercise all of the executive powers pursuant to this section.

(5) A county acting under authority of this section may assume, own, possess and control assets, rights and liabilities related to the functions and services of the county.

(6) If a county is authorized to regulate an area which the state also regulates, the county government may regulate the area only by enacting ordinances which are consistent with state law or administrative regulation.

(a) If the state statute or administrative regulation prescribes a single standard of conduct, a county ordinance is consistent if it is identical to the state statute or administrative regulation.

(b) If the state statute or administrative regulation prescribes a minimal standard of conduct, a county ordinance is consistent if it establishes a standard which is the same as or more stringent than the state standard.

(c) A county government may adopt ordinances which incorporate by reference state statutes and administrative regulations in areas in which a county government is authorized to act.

(7) County ordinances which prescribe penalties for their violation shall be enforced throughout the entire area of the county unless:

(a) Otherwise provided by statute, or

(b) The legislative body of any city within the county has adopted an ordinance pertaining to the same subject matter which is the same as or more stringent than the standards that are set forth in the county ordinance. The fiscal court shall forward a copy of each ordinance which is to be enforced throughout the entire area of the county to the mayor or chairman of the board of trustees of each city in the county.

(8) The powers granted to counties by this section shall be in addition to all other powers granted to counties by other provisions of law. A permissive procedure authorized by this section shall not be deemed to be exclusive or to prohibit the exercise of other existing laws and laws which may hereafter be enacted but shall be an alternative or supplement thereto.

(9) Any agency of county government exercising authority pursuant to subsection (3) (y) of this section shall, prior to exercising such authority, obtain the voluntary written consent of the owner of the structure. Consent may be obtained only after advising the owner in writing of any advantages and disadvantages to the owner which are likely to result from the exercise of such authority. (Enact. Acts 1972, ch. 384, § 1; 1976 (Ex. Sess.), ch. 20, §6, effective January 1, 1978; 1978, ch. 118, §3, effective June 17, 1978; 1979 (Ex. Secc.), ch 22, §1, effective May 12, 1979; 1980, ch. 149, §3, effective July 15, 1980.)

APPENDIX G

JEFFERSON CIRCUIT COURT

SEVENTH DIVISION

No. 79CI-11292

EARL J. HARTLAGE - - - *Plaintiff-Contestant*
4115 Bramers Lane
Louisville, Kentucky 40216

v.

CARL W. BROWN - - - - - *Defendant-Contestee*
3431 Heatherfield Drive
Louisville, Kentucky 40216

PETITION TO VOID ELECTION

Comes the Plaintiff-Contestant, Earl J. Hartlage, and for his cause of action, states as follows, to-wit:

1. That Plaintiff-Contestant and Defendant-Contestee at all times herein mentioned were opposing candidates in the general election held on Tuesday, November 6, 1979, for election to the office of Jefferson County Commissioner, C District, Jefferson County, Kentucky, the Plaintiff-Contestant and Defendant-Contestee being candidates for election to that office by reason of their nomination as candidates thereto in the preceding primary election held on Tuesday, May 29, 1979.

2. That the Defendant-Contestee, personally and/or through others in his behalf with his knowledge, on or about August 15, 1979, and at other times prior to said election, in Jefferson County, Kentucky generally and publicly de-

cared, pledged and/or promised that, if elected, he would reduce the salary fixed by law for the holder of said office and that he would serve in such capacity as county commissioner for an amount less than that fixed by law for the compensation of the holder of said office.

3. That the aforesaid declaration, pledge and/or promise constituted a corrupt election practice in violation of KRS 121.055.

4. That by reason of the Defendant-Contestee's violation of KRS 121.055, the election of the Defendant-Contestee to the office of County Commissioner, C District, Jefferson County, Kentucky, shall be declared void as is provided in Kentucky Revised Statute 120.015.

5. That at all times herein mentioned, the Plaintiff-Contestant did not violate any of the provisions of KRS 121.055 or any other section of the Kentucky Revised Statute which sets forth a corrupt election practice.

6. That the Plaintiff-Contestant is duly qualified to contest the instant election by reason of his candidacy for said office and by reason of the number of votes cast for Plaintiff-Contestant in said election was greater than twenty-five percent (25%) of the number of votes cast for the Defendant-Contestee in said election.

7. That pursuant to Kentucky Revised Statute 120.165 (1), the within action shall have precedence over all other cases pending before the Jefferson Circuit Court.

WHEREFORE, the Plaintiff-Contestant, Earl J. Hartlage, demands as follows:

1. That Judgment be entered declaring void the election of the Defendant-Contestee to the office of Jefferson County Commissioner, C District, by reason of his violation of KRS 121.055 and Section 150 of the Kentucky Constitution, and that, therefore, a vacancy exists in said office;

2. That he recover his costs herein expended;

3. That he receive any and all other relief to which he may appear to be entitled.

Connelly, Kaercher, Baltzell & Stamper

/s/ Victor L. Baltzell, Jr.
Attorney for Plaintiff-Contestant
219 Marion E. Taylor Building
Louisville, Kentucky 40202
Phone: 589-2100

I have read the foregoing Petition and the allegations contained therein are true and accurate to the best of my knowledge and belief.

/s/ Earl J. Hartlage
Plaintiff-Contestant

Subscribed and sworn to before me by Earl J. Hartlage, this the 3rd day of December, 1979.

My commission expires: December 13, 1982

/s/ Bert Stamper
Notary Public, State at Large, Kentucky

APPENDIX H

JEFFERSON CIRCUIT COURT

SEVENTH DIVISION

No. 79CI-11292

EARL J. HARTLAGE - - - *Plaintiff-Contestant*

v.

CARL W. BROWN - - - - *Defendant-Contestee*

ANSWER

Comes the Defendant-Contestee, Carl W. Brown, by counsel, and for answer to the Petition herein states as follows:

FIRST DEFENSE

For specific answer to the Petition, Defendant-Contestee states:

1. Paragraph 1 of the Petition is admitted.

2. That he admits that on August 15, 1979, as part of a general platform plank criticizing the Plaintiff-Contestant's increase in salary throughout his term of office and the increased cost of operating the Jefferson Fiscal Court Commissioners' office, he did state to the public at large that he believed the salary paid the Plaintiff-Contestant for the limited duties performed by the Plaintiff-Contestant was too high and that Defendant-Contestee would not maintain the county commissioners' salary at that same level, but would serve for a salary within the confines prescribed by the Kentucky Constitution and the Kentucky Revised Stat-

utes; anything in Paragraph 2 inconsistent with the above is denied.

3. Paragraph 3 of the Petition is denied.

4. Paragraph 4 of the Petition is denied.

5. Paragraph 5 of the Petition is denied and Defendant-Contestee stated that the specific violations of the Plaintiff-Contestant are more particular set out in the following affirmative defenses.

6. With respect to Paragraph 6, Defendant-Contestee admits that Plaintiff-Contestant received more than 25% of the number of votes cast for Defendant-Contestee, but denies that Plaintiff-Contestant is duly qualified to contest the instant election by virtue of his violation of the Corrupt Practices Act as is more particularly hereinafter set out.

7. Paragraph 7 of the Petition is admitted.

SECOND DEFENSE

Defendant-Contestee affirmatively states that the statements made at a press conference on August 15, 1979 (a photostatic copy of the transcript of same is attached hereto as Exhibit A), did not constitute a violation of the Corrupt Practices Act in that:

A. The Defendant-Contestee made no promise to accept less than a sum within the range of salaries set by the Constitution and the statutes; and

B. There was no promise of financial obligation to any "person"; and

C. The statement was addressed to the public at large as opposed to any one entity or group of persons.

THIRD DEFENSE

In the alternative, if the statement made by Defendant-Contestee could be considered a minor technical violation

of the statute, it should still be no ground to void the election, because the Defendant-Contestee very promptly retracted the statement, and that retraction received greater publicity than the original statement (See statement dated August 19, 1979 attached hereto as Exhibit B).

FOURTH DEFENSE

The Plaintiff-Contestant has no standing to bring this action seeking to void the election of the Defendant-Contestee in that the Plaintiff-Contestant was himself guilty of violating the Corrupt Practices Act in at least the following instances:

A. He pledged to support a collective bargaining ordinance for county employees in return for the endorsement and support of the Greater Louisville Labor Council; and

B. He pledged to support a collective bargaining ordinance for county employees in return for the endorsement and support of the Department of Human Resources Employees Association; and

C. The sign or decal on a locomotive driven by the candidate or on his behalf throughout the campaign did not contain the required disclaimer language, to-wit: "Paid for by . . ."; and

D. The Plaintiff-Contestant, Earl J. Hartlage, failed to file copies of his pre-election and post-election reports of receipts and expenditures with the Jefferson County Court Clerk, which is mandatorily required under the Corrupt Practices Act.

FIFTH DEFENSE

That the Defendant-Contestee had the right to make the statement which was made on August 15, 1979, under the United States and Kentucky Constitutional provisions

guaranteeing the right of freedom of speech, equal protection of the laws and the provisions providing for free and equal elections; any application of any provisions of the Corrupt Practices Act which might tend to restrict the making of such statements by candidates for public office would be unconstitutional.

WHEREFORE, the Defendant-Contestee demands:

1. That the Petition seeking to void his election be dismissed;

2. That this case be accorded priority over all other cases pending in the division of this Court;

3. All other proper relief to which he may appear entitled.

Richard D. Remmers
Henry S. Johnson
R. Michael Pitt
2307 Citizens Plaza
Louisville, Kentucky 40202
589-6300
Counsel for Defendant-Contestee

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer was served on Victor L. Baltzell, Jr., Counsel for Plaintiff-Contestant, 219 Marion E. Taylor Building, Louisville, Kentucky 40202, by hand-delivering a copy to him this 31st day of December, 1979.

Counsel for Defendant-Contestee

JEFFERSON CIRCUIT COURT

SEVENTH DIVISION

No. 79CI-11292

EARL J. HARTLAGE - - - - - - - *Plaintiff*

v.

CARL W. BROWN - - - - - - - *Defendant*

AMENDED ANSWER

Comes the Defendant, Carl W. Brown, by counsel, and for his first Amended Answer states as follows:

1. Defendant reaffirms and reiterates each and every allegation contained in his original Answer, as though set out verbatim herein.

2. As an additional defense, Defendant states that the Plaintiff, on or about February 23, 1979, accepted a campaign contribution in excess of $100.00, in the form of cash, in violation of the Kentucky Corrupt Practices Act.

WHEREFORE, Defendant demands the relief sought in his original Answer.

Henry S. Johnson
Handmaker, Weber & Meyer
2307 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-6300
Counsel for Defendant

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been hand delivered this 24th day of January, 1980, to Mr. Victor L. Baltzell, Jr., Attorney for Plaintiff, 219 Marion E. Taylor Building, Louisville, Kentucky 40202.

Henry S. Johnson

APPENDIX I

FOR RELEASE AUGUST 15, 1979

10:30 am

Press Contact: Steven Mobley 584-7111

PRESS CONFERENCE

August 14, 1979

BILL: As we stand here beneath the statue of George Rogers Clark, we are reminded of the spirit that guided our forefathers: the spirit that encompassed the ability both to conserve limited resources and to take bold steps when decisive action was required.

CARL: Unfortunately, it seems that the strength of this spirit has grown somewhat weak with the passage of time. With few exceptions, there has been little to illuminate the halls of our public institutions, only sparks resulting from the friction of discord. More often than not, we have been subjected to officials who merely offer lip service to austerity, while stuffing their wallets and taking incredible liberties with our tax dollars. The raises the county commissioners have given themselves in recent years and, even more recently, their hiring of an "executive assistant" are two cases in point.

Recent debate over the salaries of the County Police and other county employees has uncovered the widely-held belief that county employees are underpaid. There are, however, three part-time county commissioners. With state law limiting their authority and responsibility to legislation (KRS 67.080), it is clear that their jobs are simply not worth $20,000 a year each. It is ludicrous that the part-time commissioners nevertheless see fit to pay themselves

the same amount as that paid the full-time county judge. The mere fact that state law allows such outrageous levels of remuneration does not in itself justify those payments. The intolerable salary increases began three years ago under Hollenbach, with the persistent efforts of Commissioner Hartlage to elevate his own office. At a fiscal court meeting in 1976, Hartlage led a surprise move to abolish an office created by Hollenbach and more than double the salaries of the county commissioners! His actions demonstrated his unmistakable disrepect for the office of the chief executive of this county and his utter disdain for the spirit of laws that govern our county system. In typical neanderthal style, using the grey fringes of the law for his own personal gain, Hartlage led the move to funnel county tax dollars into commissioners' pockets.

BILL: Subsequent county commissioners have implied approval of this ridiculous arrangement by making no move to change it. They ignore the fact documented by the Kentucky Association of Counties, that Jefferson County is the only county in the entire state that pays its part-time fiscal court members the same salary as that paid our full-time county judge.

We abhor the commissioner's outrageous salaries. And to prove the strength of our convictions, one of our first official acts as county commissioners will be to lower our salary to a more realistic level. We will lower our salaries, saving the tax payers $36,000 during our first term of office, by $3,000 each per year.

The current commissioners' wasteful tendencies extend beyond their own salaries. Their creation of the $34,000 a year post of executive assistant reflects further fiscal extravagance and a tendency to overstep their legal authority. The position is nothing more than a thinly disguised political campaign manager paid with public funds. It will be abolished as soon as we take office.

In its place, we will organize a staff composed of three legislative assistants, one for each commissioner, as well as the necessary clerical staff. Instead of having *one* lavishly paid assistant trying to serve *three* masters who have widely divergent views, we will have three legislative assistants who will assist the respective commissioners with budget and legislative review, the proper responsibilties of the commissioners. An idea staff set up, it can be implemented by using the dollars currently allotted to the commissioners' office and slightly readjusting staff responsibilities.

CARL: These two proposals—cutting our own salaries and reorganizing the commissioner's office staff, will save the taxpayers over $172,000 during our term of office.

We make these statements fully aware that the office we intend to occupy should set the tone for the type of public officials we intend to be.

Under our guidance, extravagance at public expense will be a thing of the past, and responsibility and integrity will be our watchwords, Progress through Cooperation our theme.

APPENDIX J

PRESS RELEASE

August 19, 1979

Dr. Bill Creech

and

Carl Brown

Last Wednesday we stood beneath the statue of George Rogers Clark to make the point that we embrace the philosophy of conservation of limited resources, and made a pledge to reduce government spending, beginning with the Commissioners' office.

Today, we stand beneath the statue of Honest Abe Lincoln to emphasize something that will be a hallmark of our tenure in office: openness and candor.

Last week, we pledged to reduce the Commissioners' salaries because we are committed to responsible government spending, and because we abhor the greed displayed by Hartlage's doubling of his own salary soon after taking office. And now, to our surprise and dismay, we find that, at least in some instances, attempts at good government may not be legal.

We are men enough to admit when we've made a mistake.

We have discovered that there are Kentucky court decisions and Attorney General opinions which indicate that our pledge to reduce our salaries if elected may be illegal.

This has to be one of the most ridiculous lines of court decisions we have ever seen. Why should it be illegal for us to promise that if elected we will cease being the only one of Kentucky's 120 counties which pays its part-time county commissioners the same amount of money as its full-time County Judge/Executive? Why should we not

be able to reduce government waste wherever we find it? Why shouldn't we be able to cut our own salaries? This appears to us to be a sweetheart deal with one group of politicians protecting other politicians. A classic "you scratch my back, I'll scratch yours."

However, being lawabiding citizens and being pledged to enforcing all laws, we do hereby formally rescind our pledge to reduce the County Commissioners' salary if elected and instead pledge to seek corrective legislation in the next session of the General Assembly, to correct this silly provision of State Law.

We regret having to take this action, but we regret even more the circumstances which led to this whole episode—Earl Hartlage doubling his salary shortly after his election.

While a political line of court cases may cause us a setback in this situation, we refuse to be sidetracked from the overriding issue—government wasting tax dollars. Time and time again we have seen Judge McConnell rebuffed in his efforts to reduce government spending. We are running to provide the citizens of this community an independent, but cooperative, Fiscal Court. We truly believe in our campaign slogan—"Progress Through Cooperation."

APPENDIX K

Rule 76.30 Mandate

(1) **Definition.** The mandate is a writ of the appellate court, issued by the clerk and directed to the court from which the appeal was taken, which makes effective the opinion disposing of the appeal. The issuance or recall of such mandate is within the discretion of the court.

(2) **Time for Issuance.**

(a) A mandate of the Supreme Court shall be issued on the 21st day after the date its opinion was rendered unless a petition under Rule 76.32 has been timely filed. A mandate of the Court of Appeals shall be issued on the 41st day after the date its opinion was rendered unless a petition under Rule 76.32 or a motion for review under Rule 76.20 has been timely filed.

(b) In the event of a timely motion for discretionary review under Rule 76.20, the mandate shall be issued forthwith after denial of the motion, but if the motion for discretionary review is granted, there will be no mandate from the court whose decision is to be reviewed; and

(c) In the event of a timely petition under Rule 76.32, (i) if it is in the Supreme Court and is denied, the mandate shall be issued forthwith upon such denial, but if the petition be granted and a new opinion rendered, the mandate shall be issued on the 21st day thereafter unless a further petition under Rule 76.32 has been timely filed or unless the time for such filing has been extended; (ii) if it is in the Court of Appeals, the mandate shall be issued on the 21st day after the date on which the petition was denied unless a motion for discretionary review under Rule 76.20 has been timely filed, and on the 41st day after the date on which the petition was granted unless a further petition

under Rule 76.32 or a motion for discretionary review under Rule 76.20 has been timely filed.

(d) Unless otherwise ordered, (i) in no event shall a mandate issue pending final disposition of a timely motion for discretionary review under Rule 76.20 or a timely petition under Rule 76.32; and (ii) in every case it shall issue when no such motion or petition has been filed within the time allowed for that purpose.

(e) Upon issuance of the mandate the clerk shall forthwith send it to the court from which the appeal was taken and send a copy of it to each attorney of record. The clerk of the latter court shall forthwith file the mandate in the original record and note the filing on the proper docket; and

(f) No mandate shall be required to make effective a final decision of an appellate court entered by order. A decision styled as an "Opinion and Order" shall be deemed an order.

(Adopted October 14, 1977, effective January 1, 1978.)

APPENDIX L

Rule 76.44 Stay Pending Review by United States Supreme Court

The taking of an appeal to the Supreme Court of the United States or the filing in that court of a petition for review on a writ of certiorari will not be cause for withholding or recalling a mandate. An order staying execution and enforcement of a mandate, or of an order granting relief, may be entered upon motion under the following circumstances and conditions and for the periods designated:

(a) When an appeal is taken to the Supreme Court of the United States by the filing of a notice of appeal with the clerk of an appellate court as required by Rule 10 of the Rules of the Supreme Court of the United States and otherwise in accordance with Part IV of the Rules of that court, a stay during the pendency of the appeal may be granted on motion by any judge of the appellate court. The stay may be conditioned upon the giving of security to be fixed and approved by the judge that the appeal will be duly perfected and prosecuted as required by the Rules of the Supreme Court of the United States, and if the stay is to act as a supersedeas, a supersedeas bond shall be required in accordance with Rule 18 of the Rules of the Supreme Court of the United States. (Supreme Court Rules may be found in 28 U.S.C.A. Rules, Supreme Court); and

(b) When a party desires to make application for a writ of certiorari, a stay may be granted by any judge of the appellate court for such specified number of days not exceeding 90, as may reasonably be required to enable the writ to be obtained, and may be conditioned upon the giving of adequate security as specified in Title 28, Section 2101(f), U. S. Code.

APPENDIX M

COURT OF APPEALS OF KENTUCKY

No. 80-CA-385-MR

EARL J. HARTLAGE - - - - - - *Appellant*

v.

CARL W. BROWN - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
No. 79-CI-11292

ORDER—Entered December 10, 1980

The appellee, having moved for immediate relief staying or recalling the mandate of this court issued or to be issued in the above-styled proceedings, and it appearing that the enforcement of such mandate should be stayed until a hearing can be held upon the motion, it is hereby ORDERED that the enforcement of the mandate of this Court be STAYED pending further orders of the Court. A hearing upon the motion will be held at 10:00 a.m., December 16, 1980, at the Central Office of the Court of Appeals, 403 Wapping Street, Frankfort, Kentucky.

(s) Roy N. Vance
Judge, Court of Appeals

APPENDIX N

COURT OF APPEALS OF KENTUCKY

No. 80-CA-385-MR

EARL J. HARTLAGE - - - - - - *Appellant*

v.

CARL W. BROWN - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Michael O. McDonald, Judge
Action No. 79-CI-11292

ORDER—Entered December 16, 1980

BEFORE: WILHOIT, VANCE, and WINTERSHEIMER.

The appellee, having moved for immediate relief staying or recalling the mandate of this Court which issued on December 10, 1980, in the above-styled proceedings, and the Court having heard argument of counsel, it appears that the enforcement of such mandate of this Court should be STAYED until March 9, 1981, and the Court being sufficiently advised, it is so ORDERED.

(s) Anthony M. Wilhoit
Judge, Court of Appeals

APPENDIX O

COURT OF APPEALS OF KENTUCKY

No. 80-CA-385-MR

EARL J. HARTLAGE - - - - - - *Appellant*

v.

CARL W. BROWN - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Michael O. McDonald, Judge
No. 79-CI-11292

ORDER—Entered December 16, 1980

BEFORE: WILHOIT, VANCE, and WINTERSHEIMER, JUDGES.

This cause having come before the Court on motion for leave to substitute Fred M. Goldberg and Jonathan D. Goldberg, as counsel for the appellee herein, Carl W. Brown, and it appearing that the firm of Handmaker, Weber & Meyer, and the said Carl W. Brown have agreed to such motion, and the Court being otherwise sufficiently advised, it is hereby so ORDERED.

(s) Anthony M. Wilhoit
Judge, Court of Appeals

Office-Supreme Court, U.S.
FILED
MAY 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1285

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CARL W. BROWN - - - - - - Petitioner

vs.

EARL J. HARTLAGE - - - - - Respondent

On Writ of Certiorari to the Court of Appeals of Kentucky

JOINT APPENDIX

FRED M. GOLDBERG
JONATHAN D. GOLDBERG
GOLDBERG & SIMPSON, P.S.C.
2800 First National Tower
Louisville, Kentucky 40202
(502) 589-4440
Counsel for Petitioner

VICTOR L. BALTZELL, JR.
CONNELLY, KAERCHER, BALTZELL
& STAMPER
715 Marion E. Taylor Building
Louisville, Kentucky 40202
(502) 589-2100
Counsel for Respondent

PETITION FOR CERTIORARI FILED JANUARY 26, 1981.
CERTIORARI GRANTED MARCH 30, 1981.

JOINT APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

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FOR RELEASE AUGUST 15, 1979

10:30 am

Press Contact: Steven Mobley 584-7111

PRESS CONFERENCE

August 14, 1979

BILL: As we stand here beneath the statue of George Rogers Clark, we are reminded of the spirit that guided our forefathers: the spirit that encompassed the ability both to conserve limited resources and to take bold steps when decisive action was required.

CARL: Unfortunately, it seems that the strength of this spirit has grown somewhat weak with the passage of time. With few exceptions, there has been little to illuminate the halls of our public institutions, only sparks resulting from the friction of discord. More often than not, we have been subjected to officials who merely offer lip service to austerity, while stuffing their wallets and taking incredible liberties with our tax dollars. The raises the county commissioners have given themselves in recent years and, even more recently, their hiring of an "executive assistant" are two cases in point.

Recent debate over the salaries of the County Police and other county employees has uncovered the widely-held belief that county employees are underpaid. There are, however, three part-time county commissioners. With state law limiting their authority and responsibility to legislation (KRS 67.080), it is clear that their jobs are simply not worth $20,000 a year each. It is ludicrous that the part-time commissioners nevertheless see fit to pay themselves

the same amount as that paid the full-time county judge. The mere fact that state law allows such outrageous levels of remuneration does not in itself justify those payments. The intolerable salary increases began three years ago under Hollenbach, with the persistent efforts of Commissioner Hartlage to elevate his own office. At a fiscal court meeting in 1976, Hartlage led a surprise move to abolish an office created by Hollenbach and more than double the salaries of the county commissioners! His actions demonstrated his unmistakable disrepect for the office of the chief executive of this county and his utter disdain for the spirit of laws that govern our county system. In typical neanderthal style, using the grey fringes of the law for his own personal gain, Hartlage led the move to funnel county tax dollars into commissioners' pockets.

BILL: Subsequent county commissioners have implied approval of this ridiculous arrangement by making no move to change it. They ignore the fact documented by the Kentucky Association of Counties, that Jefferson County is the only county in the entire state that pays its part-time fiscal court members the same salary as that paid our full-time county judge.

We abhor the commissioner's outrageous salaries. And to prove the strength of our convictions, one of our first official acts as county commissioners will be to lower our salary to a more realistic level. We will lower our salaries, saving the tax payers $36,000 during our first term of office, by $3,000 each per year.

The current commissioners' wasteful tendencies extend beyond their own salaries. Their creation of the $34,000 a year post of executive assistant reflects further fiscal extravagance and a tendency to overstep their legal authority. The position is nothing more than a thinly disguised political campaign manager paid with public funds. It will be abolished as soon as we take office.

In its place, we will organize a staff composed of three legislative assistants, one for each commissioner, as well as the necessary clerical staff. Instead of having *one* lavishly paid assistant trying to serve *three* masters who have widely divergent views, we will have three legislative assistants who will assist the respective commissioners with budget and legislative review, the proper responsibilties of the commissioners. An idea staff set up, it can be implemented by using the dollars currently allotted to the commissioners' office and slightly readjusting staff responsibilities.

CARL: These two proposals—cutting our own salaries and reorganizing the commissioner's office staff, will save the taxpayers over $172,000 during our term of office.

We make these statements fully aware that the office we intend to occupy should set the tone for the type of public officials we intend to be.

Under our guidance, extravagance at public expense will be a thing of the past, and responsibility and integrity will be our watchwords, Progress through Cooperation our theme.

PRESS RELEASE
August 19, 1979

Dr. Bill Creech
and
Carl Brown

Last Wednesday we stood beneath the statue of George Rogers Clark to make the point that we embrace the philosophy of conservation of limited resources, and made a pledge to reduce government spending, beginning with the Commissioners' office.

Today, we stand beneath the statue of Honest Abe Lincoln to emphasize something that will be a hallmark of our tenure in office: openness and candor.

Last week, we pledged to reduce the Commissioners' salaries because we are committed to responsible government spending, and because we abhor the greed displayed by Hartlage's doubling of his own salary soon after taking office. And now, to our surprise and dismay, we find that, at least in some instances, attempts at good government may not be legal.

We are men enough to admit when we've made a mistake.

We have discovered that there are Kentucky court decisions and Attorney General opinions which indicate that our pledge to reduce our salaries if elected may be illegal.

This has to be one of the most ridiculous lines of court decisions we have ever seen. Why should it be illegal for us to promise that if elected we will cease being the only one of Kentucky's 120 counties which pays its part-time county commissioners the same amount of money as its full-time County Judge/Executive? Why should we not

be able to reduce government waste wherever we find it? Why shouldn't we be able to cut our own salaries? This appears to us to be a sweetheart deal with one group of politicians protecting other politicians. A classic "you scratch my back, I'll scratch yours."

However, being lawabiding citizens and being pledged to enforcing all laws, we do hereby formally rescind our pledge to reduce the County Commissioners' salary if elected and instead pledge to seek corrective legislation in the next session of the General Assembly, to correct this silly provision of State Law.

We regret having to take this action, but we regret even more the circumstances which led to this whole episode—Earl Hartlage doubling his salary shortly after his election.

While a political line of court cases may cause us a setback in this situation, we refuse to be sidetracked from the overriding issue—government wasting tax dollars. Time and time again we have seen Judge McConnell rebuffed in his efforts to reduce government spending. We are running to provide the citizens of this community an independent, but cooperative, Fiscal Court. We truly believe in our campaign slogan—"Progress Through Cooperation."

Commonwealth of Kentucky
County of Jefferson

Certificate of Election

We, the undersigned, duly authorized to canvass the returns of the County of Jefferson, do hereby Certify that at the General Election, held in said County on November 6, 1979 the following vote was tabulated for the office of County Commissioner - "C" District

Jefferson County Kentucky.

Earl J. Hartlage	83,675 Votes
Carl Brown	93,826 Votes

Carl Brown, having received the highest number of votes cast for the office of County Commissioner - "C" District was duly elected to fill the said office.

Witness our hands, this the 27th day of November 19 79, at Louisville, Kentucky.

Bremer Ehrler
Chairman, Jefferson County Board of Elections

James T. Stanfield
Republican Member

Walter L. Catalfo
Democratic Member

Joe Sherman
Sheriff, Jefferson County, Kentucky

JEFFERSON CIRCUIT COURT

SEVENTH DIVISION

No. 79CI-11292

EARL J. HARTLAGE - - - *Plaintiff-Contestant*
4115 Bramers Lane
Louisville, Kentucky 40216

v.

CARL W. BROWN - - - - *Defendant-Contestee*
3431 Heatherfield Drive
Louisville, Kentucky 40216

PETITION TO VOID ELECTION

Comes the Plaintiff-Contestant, Earl J. Hartlage, and for his cause of action, states as follows, to-wit:

1. That Plaintiff-Contestant and Defendant-Contestee at all times herein mentioned were opposing candidates in the general election held on Tuesday, November 6, 1979, for election to the office of Jefferson County Commissioner, C District, Jefferson County, Kentucky, the Plaintiff-Contestant and Defendant-Contestee being candidates for election to that office by reason of their nomination as candidates thereto in the preceding primary election held on Tuesday, May 29, 1979.

2. That the Defendant-Contestee, personally and/or through others in his behalf with his knowledge, on or about August 15, 1979, and at other times prior to said election, in Jefferson County, Kentucky generally and publicly de-

clared, pledged and/or promised that, if elected, he would reduce the salary fixed by law for the holder of said office and that he would serve in such capacity as county commissioner for an amount less than that fixed by law for the compensation of the holder of said office.

3. That the aforesaid declaration, pledge and/or promise constituted a corrupt election practice in violation of KRS 121.055.

4. That by reason of the Defendant-Contestee's violation of KRS 121.055, the election of the Defendant-Contestee to the office of County Commissioner, C District, Jefferson County, Kentucky, shall be declared void as is provided in Kentucky Revised Statute 120.015.

5. That at all times herein mentioned, the Plaintiff-Contestant did not violate any of the provisions of KRS 121.055 or any other section of the Kentucky Revised Statute which sets forth a corrupt election practice.

6. That the Plaintiff-Contestant is duly qualified to contest the instant election by reason of his candidacy for said office and by reason of the number of votes cast for Plaintiff-Contestant in said election was greater than twenty-five percent (25%) of the number of votes cast for the Defendant-Contestee in said election.

7. That pursuant to Kentucky Revised Statute 120.165 (1), the within action shall have precedence over all other cases pending before the Jefferson Circuit Court.

WHEREFORE, the Plaintiff-Contestant, Earl J. Hartlage, demands as follows:

1. That Judgment be entered declaring void the election of the Defendant-Contestee to the office of Jefferson County Commissioner, C District, by reason of his violation of KRS 121.055 and Section 150 of the Kentucky Constitution, and that, therefore, a vacancy exists in said office;

2. That he recover his costs herein expended;

3. That he receive any and all other relief to which he may appear to be entitled.

Connelly, Kaercher, Baltzell & Stamper

/s/ Victor L. Baltzell, Jr.
Attorney for Plaintiff-Contestant
219 Marion E. Taylor Building
Louisville, Kentucky 40202
Phone: 589-2100

I have read the foregoing Petition and the allegations contained therein are true and accurate to the best of my knowledge and belief.

/s/ Earl J. Hartlage
Plaintiff-Contestant

Subscribed and sworn to before me by Earl J. Hartlage, this the 3rd day of December, 1979.

My commission expires: December 13, 1982

/s/ Bert Stamper
Notary Public, State at Large, Kentucky

JEFFERSON CIRCUIT COURT

SEVENTH DIVISION

No. 79CI-11292

EARL J. HARTLAGE - - - *Plaintiff-Contestant*

v.

CARL W. BROWN - - - - *Defendant-Contestee*

ANSWER

Comes the Defendant-Contestee, Carl W. Brown, by counsel, and for answer to the Petition herein states as follows:

FIRST DEFENSE

For specific answer to the Petition, Defendant-Contestee states:

1. Paragraph 1 of the Petition is admitted.

2. That he admits that on August 15, 1979, as part of a general platform plank criticizing the Plaintiff-Contestant's increase in salary throughout his term of office and the increased cost of operating the Jefferson Fiscal Court Commissioners' office, he did state to the public at large that he believed the salary paid the Plaintiff-Contestant for the limited duties performed by the Plaintiff-Contestant was too high and that Defendant-Contestee would not maintain the county commissioners' salary at that same level, but would serve for a salary within the confines prescribed by the Kentucky Constitution and the Kentucky Revised Stat-

utes; anything in Paragraph 2 inconsistent with the above is denied.

3. Paragraph 3 of the Petition is denied.

4. Paragraph 4 of the Petition is denied.

5. Paragraph 5 of the Petition is denied and Defendant-Contestee stated that the specific violations of the Plaintiff-Contestant are more particular set out in the following affirmative defenses.

6. With respect to Paragraph 6, Defendant-Contestee admits that Plaintiff-Contestant received more than 25% of the number of votes cast for Defendant-Contestee, but denies that Plaintiff-Contestant is duly qualified to contest the instant election by virtue of his violation of the Corrupt Practices Act as is more particularly hereinafter set out.

7. Paragraph 7 of the Petition is admitted.

SECOND DEFENSE

Defendant-Contestee affirmatively states that the statements made at a press conference on August 15, 1979 (a photostatic copy of the transcript of same is attached hereto as Exhibit A), did not constitute a violation of the Corrupt Practices Act in that:

A. The Defendant-Contestee made no promise to accept less than a sum within the range of salaries set by the Constitution and the statutes; and

B. There was no promise of financial obligation to any "person"; and

C. The statement was addressed to the public at large as opposed to any one entity or group of persons.

THIRD DEFENSE

In the alternative, if the statement made by Defendant-Contestee could be considered a minor technical violation

of the statute, it should still be no ground to void the election, because the Defendant-Contestee very promptly retracted the statement, and that retraction received greater publicity than the original statement (See statement dated August 19, 1979 attached hereto as Exhibit B).

FOURTH DEFENSE

The Plaintiff-Contestant has no standing to bring this action seeking to void the election of the Defendant-Contestee in that the Plaintiff-Contestant was himself guilty of violating the Corrupt Practices Act in at least the following instances:

A. He pledged to support a collective bargaining ordinance for county employees in return for the endorsement and support of the Greater Louisville Labor Council; and

B. He pledged to support a collective bargaining ordinance for county employees in return for the endorsement and support of the Department of Human Resources Employees Association; and

C. The sign or decal on a locomotive driven by the candidate or on his behalf throughout the campaign did not contain the required disclaimer language, to-wit: "Paid for by . . ."; and

D. The Plaintiff-Contestant, Earl J. Hartlage, failed to file copies of his pre-election and post-election reports of receipts and expenditures with the Jefferson County Court Clerk, which is mandatorily required under the Corrupt Practices Act.

FIFTH DEFENSE

That the Defendant-Contestee had the right to make the statement which was made on August 15, 1979, under the United States and Kentucky Constitutional provisions

guaranteeing the right of freedom of speech, equal protection of the laws and the provisions providing for free and equal elections; any application of any provisions of the Corrupt Practices Act which might tend to restrict the making of such statements by candidates for public office would be unconstitutional.

WHEREFORE, the Defendant-Contestee demands:

1. That the Petition seeking to void his election be dismissed;

2. That this case be accorded priority over all other cases pending in the division of this Court;

3. All other proper relief to which he may appear entitled.

Richard D. Remmers
Henry S. Johnson
R. Michael Pitt
2307 Citizens Plaza
Louisville, Kentucky 40202
589-6300
Counsel for Defendant-Contestee

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer was served on Victor L. Baltzell, Jr., Counsel for Plaintiff-Contestant, 219 Marion E. Taylor Building, Louisville, Kentucky 40202, by hand-delivering a copy to him this 31st day of December, 1979.

Counsel for Defendant-Contestee

JEFFERSON CIRCUIT COURT

SEVENTH DIVISION

No. 79CI-11292

EARL J. HARTLAGE - - - - - - - *Plaintiff*

v.

CARL W. BROWN - - - - - - - *Defendant*

AMENDED ANSWER

Comes the Defendant, Carl W. Brown, by counsel, and for his first Amended Answer states as follows:

1. Defendant reaffirms and reiterates each and every allegation contained in his original Answer, as though set out verbatim herein.

2. As an additional defense, Defendant states that the Plaintiff, on or about February 23, 1979, accepted a campaign contribution in excess of $100.00, in the form of cash, in violation of the Kentucky Corrupt Practices Act.

WHEREFORE, Defendant demands the relief sought in his original Answer.

Henry S. Johnson
Handmaker, Weber & Meyer
2307 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-6300
Counsel for Defendant

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been hand delivered this 24th day of January, 1980, to Mr. Victor L. Baltzell, Jr., Attorney for Plaintiff, 219 Marion E. Taylor Building, Louisville, Kentucky 40202.

Henry S. Johnson

JEFFERSON CIRCUIT COURT

SEVENTH DIVISION

No. 79CI11292

EARL J. HARTLAGE - - - - - - - *Plaintiff*

v.

CARL W. BROWN - - - - - - - *Defendant*

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND OPINION

This case was tried, pursuant to KRS 120.165, on January 29 and 30, 1980, without a jury, and is of record.

On December 4, 1979, the plaintiff-contestant, Earl J. Hartlage, filed a petition against the defendant-contestee, Carl W. Brown, alleging that Brown violated the Kentucky Corrupt Practices Act, specifically, KRS 121.055. Because of the violation, Hartlage demands that Brown's election to the office of Jefferson County Commissioner, "C" District, be voided, and the office vacated by Brown. (KRS 120.155 restricts the filing of a suit over a contest of a regular election to any candidate, provided that the candidate obtained not less than 25% of the votes cast for the successful candidate. *Dietz* v. *Zimmer*, 231 Ky. 546, 21 S. W. 2d 999 limits the suit for bringing the action to a defeated candidate.)

Both Hartlage and Brown were their respective party's nominees for the office in question from "C" District. "C" District encompasses an area generally referred to as the

southwest portion of Jefferson County, Kentucky. Hartlage was the Democratic nominee, and Brown, the Republican.

In the general election of November 6, 1979, Brown defeated Hartlage, the incumbent, by 10,151 votes. The candidates were voted for by the County-wide electorate; however, their primary races were confined to their respective district.

During the regular election campaign, on August 15, 1979, Brown, along with Dr. Bill Creech, "B" District Republican candidate, held a televised press conference and made the following statements:

Mr. Brown: ". . . with state law limiting their authority and responsibility (referring to County Commissioners) to legislation (KRS 67.080), it is clear that their jobs are simply not worth $20,000 a year each. It is ludicrous that part-time Commissioners nevertheless see fit to pay themselves the same amount as that paid the full-time County Judge. The mere fact that state law allows such outrageous levels of remuneration does not in itself justify these payments."

". . . using the gray fringes of the law for his own personal gain, Hartlage led the move to funnel County tax dollars into Commissioners' pockets."

Brown, during the same conference, supported and acquiesced in the following statement of Dr. Bill Creech:

Dr. Creech: "We abhor the Commissioners' outrageous salaries, and to prove the strength of our convictions, one of our first official acts as County Commissioners will be to lower our salary to a more realistic level. We will lower our salaries, saving the taxpayers $36,000 during our first term of office, by $3,000 each per year."

Later in the conference Brown went on to say, "These 2 proposals—cutting our own salaries and reorganizing the

Commissioners' office staff will save the taxpayers over $172,000 during our first term of office."

The Sunday after the press conference, a friend of Brown called to inform him that he may have violated the Corrupt Practices Act by making the statements mentioned in the press conference. Brown, a lawyer, personally researched the matter and concluded that a valid question could be raised on the statements as to whether they were violations. A retraction by Brown and Creech was made at a televised press conference on August 19, 1979. Partial statements are as follows:

"We are men enough to admit when we've made a mistake. We have discovered that there are Kentucky Court decisions . . . which indicate that our pledge to reduce our salaries, if elected, may be illegal." ". . . we do hereby rescind our pledge to reduce the County Commissioner's salary, if elected, and instead, pledge to seek corrective legislation in the next session of the general assembly, to correct this silly provision of state law."

The Court will judicially note that Dr. Bill Creech was defeated by Jim "Pop" Malone in the regular election for "B" District Commissioner.

There is no Kentucky case law concerning the effect, if any, of a repudiation or retraction of this type pledge or promise to the public. However, a Nebraska case, *State ex rel. Burkett* v. *Swanson,* 291 N. W. 481 (1940) stands for the proposition that a withdrawal of a statement of this nature cannot be treated as a defense, but this precedent is not binding upon the Court.

The Court will comment on the retraction and repudiation of the offer to reduce the salary. The retraction press conference of August 19, 1979, when reviewed, was not that of a remorseful penitent. The retraction statement did not admit a violation, or that the statements were violations,

but that the statements raised a reasonable question of violation as a result of silly law. The retraction accused the branches of government of being in cahoot with one another and scratching one another's back. Brown and Creech further said that if there was a violation in what was said, Hartlage caused the violation by doubling his salary after his previous election.

The Petition further alleged that Brown made other statements in public concerning the salary reduction pledge; however, the Court finds no substance to this allegation. The evidence is plain that whenever the issue was discussed again, it was repudiated, and when it was discussed, the matter in controversy was put to Brown either by Mr. Hartlage at subsequent meetings of candidates, or by persons from an audience in a public forum. The evidence reveals no retreat by Brown from the retraction and repudiation that was publicly made August 19, 1979.

Brown, by his response to this action, offered various defenses to the allegation in the Petition. He admitted the statements were made on August 15, 1979. He asserts that the reduction in salary is within the confines of prescribed law; that there was no claim to serve without compensation, but contends the salary should be consistent with the duties of the office, which would dictate a reduction in salary; that Hartlage has no standing to bring the suit because he violated the Corrupt Practices Act himself, under KRS 120.-155, and therefore, the equitable doctrine of "clean hands" would apply and deny Hartlage's right to contest this election. Brown further contended that the retraction of August 19, 1979, cured any violation, if one existed.

The Court finds the defense is without substance. It was alleged that Hartlage made an agreement, contrary to law, with the Greater Louisville Central Labor Council, and with the Department of Human Services Employees Association for his endorsement in the election. The alleged

agreement concerned a commitment by Mr. Hartlage over collective bargaining rights for governmental employees. Actually, the evidence was to the contrary. It's also alleged that Hartlage failed to make election finance disclosures in a proper way by not filing the reports with the County Clerk, although the reports had been filed with the Registry. This was found to exist but was cured within a reasonable time after it was discovered, and the law was complied with. Therefore, the Court finds substantial compliance on this point. (See *Roberts* v. *Byrd*, 344 S. W. 2d 378 (1961).)

The only violation of Hartlage, about which Brown complains, really worth comment is the failure of Hartlage to have the disclaimer on his campaign locomotive. But this violation is so insignificant it does not reach the dignity of precluding Hartlage from bringing this suit. This violation is found by the Court to be *de minimis*.

In all, the defenses raised fail to block Hartlage from asserting the claim in the Petition either legally or equitably.

Therefore, one issue now before the Court is whether the pledge of Brown, in the statement of August 15, 1979, is a violation of the Corrupt Practices Act.

KRS 121.055 states as follows:

> *Candidates prohibited from making expenditure or loan, or agreement as to action when elected, to secure vote or support.*—No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contract with any person to vote for or support any particular individual, thing or measure, in con-

sideration for the vote or the financial or moral support of that person in any election, primary or nominating convention, and no person shall demand that any candidate make such a promise, agreement or contract.

The Court answers the above question in the affirmative. *Sparks* v. *Boggs*, 339 S. W. 2d 480 (1960), is explicit on this point. It states, "It appears to us there can be no escape from the conclusion that a promise to take a reduction in salary set by law for an elected public office . . . advanced by one to induce votes for his candidacy, is so vicious in its tendency as to constitute a violation of the Corrupt Practices Act."

This leads us to the question as to whether the Commissioner's salary, as mentioned by Brown in his pledge, was set by law. There is no question in the Court's mind concerning this issue either, and the Court finds that the Commissioner's salary was set by law. KRS 64.530(5) fixes the monthly compensation of County officers elected by popular vote. The Commissioners are therein included. Further, KRS 64.527 permits the equating of Commissioners' salaries to present value of the purchasing dollar, or adjusting the compensation based upon the "rubber dollar" theory. To otherwise find would require manipulation of the law by legal gymnastics which this Court is unable to perform.

So, the Court having found there was a promise to reduce Brown's salary as set by law, it naturally follows there was a violation of the Corrupt Practices Act, specifically, KRS 121.055, and this finding is in compliance with the rationale of *Sparks* v. *Boggs, supra.*

Now, the question is whether the election of Brown should be voided and his office vacated. Hartlage argues that it's an automatic voiding of the election and vacating

of the office if a violation of this nature is found to exist. The cases cited refer to this type of promise as a bribery, and the only remedy, according to Hartlage, is the relief demanded by his Petition. Hartlage is not without legal support in that KRS 120.015 states that if a violation occurs the election shall be declared void.

The Court generally agrees with Hartlage except for the end result. The Court does not adjudge that the election should be voided and the office vacated. The Court's explanation is as follows:

There is reasoning given to us in *Owsley* v. *Hill*, 275 S. W. 797 (1925), that if the promise to reduce salary is made to the public at large, there is no violation. All other cases cited were promises of a reduction in salary for the benefit of specific groups and to accomplish a particular purpose. The beneficiaries in those cases included widows and orphans, religious groups, retarded children, Little League baseball, the hiring of a city manager, and so forth. In *Owsley* the candidate promised to reduce to a previously fixed sum and transfer the savings to a road fund for the County. Our highest Court said, "We cannot feel that this statute refers to promises made the entire people, and to hold otherwise would prevent any candidate from pledging himself to support measures designed to correct evils of which the people were complaining."

The *Sparks* case, however, appears to overrule *Owsley*, so it is inescapable to conclude that a violation of the Corrupt Practices Act did not occur. But the Court resists the proposition that automatic voiding of the election must necessarily follow because the Court further concludes that the law requires more.

KRS 120.165(4) states:

> If it appears from an inspection of the whole record that there has been such . . ., *bribery* . . . in the

> conduct of the election that neither contestant nor contestee can be judged to have been fairly elected, the Circuit Court . . ., may adjudge that there has been no election.

The Court is led to believe that this statutory provision is inconsistent with KRS 120.015. KRS 120.165(4) speaks of bribery and the *Sparks* case and *Kluemper* v. *Zimmer*, 41 S. W. 2d 1115 (1931), declare these promises to be bribery. Applying KRS 120.165(4) further, and reviewing the whole record, considering the following:

1) the almost immediate retraction, by Brown;
2) no subsequent retreat by Brown from the retraction;
3) balancing the violation against disenfranchisement of thousands of votes;
4) the presumption of the will of the people in the election process; and
5) the defeat of Dr. Creech, Brown's running mate, who had made the same statements in the same county-wide election;

the Court adjudges, pursuant to KRS 120.165(4), that Brown was fairly elected. KRS 120.165(4) overcomes the mandatory application of KRS 120.015.

Previously, the Court faintly criticized Brown for saying the law is silly. Therefore, the Court will refer to the law as unique when the Court tries to grasp the reasoning of the legislature in these statutes. Under KRS 120.015, and since only a defeated candidate may file suit to contest the election, and further conditioned upon the defeated candidate obtaining 25% of the successful candidate's votes cast, if the successful candidate's promise is big enough, and the defeat is resounding enough, then there can be no contest over the violation.

Therefore, in keeping with the seriousness of the matter as the law so clearly requires, the defendant-contestee, Brown, is adjudged to have violated KRS 121.055; however, for the reasons above stated, his election is not voided. Further, in keeping with the seriousness of the condemnation of his campaign promise, the costs of this action shall be taxed against him. Either counsel may prepare judgment consistent herewith, with notice to opposing counsel.

/s/ Michael O. McDonald
Judge

Date:

cc: Victor L. Baltzell, Jr.
Richard D. Remmers

JEFFERSON CIRCUIT COURT

DIVISION SEVEN

No. 79-CI-11292

EARL J. HARTLAGE - - - - - - - *Plaintiff*

v.

CARL BROWN - - - - - - - *Defendant*

JUDGMENT

This cause having come on for a hearing before the Court, arguments for the Plaintiff and the Defendant having been fully presented, and the Court having entered its findings of fact and conclusions of law and opinion on February 6, 1980,

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. The findings of fact and conclusions of law and opinion entered on February 6, 1980, are incorporated herein by reference as if set out verbatim herein;

2. The relief sought in the petition is denied;

3. The election of Carl W. Brown as Commissioner of the Jefferson County Fiscal Court from C District, Jefferson County, Kentucky, is upheld;

4. The Defendant, Carl W. Brown, shall pay the costs of this action;

5. That pursuant to CR 54.02 this is a final and appealable order and there is no just reason for delay in its entry or execution.

/s/ Michael O. McDonald
Judge

Date: February 12, 1980

Tendered by:

/s/ Richard D. Remmers
Counsel for Carl W. Brown
Henry S. Johnson
R. Michael Pitt
2307 Citizens Plaza
Louisville, Kentucky 40202
589-6300

Have Seen; Notice of Filing Waived:

/s/ Victor L. Baltzell, Jr.
Counsel for Earl J. Hartlage
200 Marion E. Taylor Building
Louisville, Kentucky 40202
589-2100

OPINION RENDERED: AUGUST 8, 1980; 10:00 A.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 80-CA-385-MR

EARL J. HARTLAGE - - - - - - *Appellant*

v.

CARL W. BROWN - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Michael O. McDonald, Judge
Action No. 79-CI-11292

REVERSING

BEFORE: VANCE, HOGGE and GUDGEL, Judges.

HOGGE, JUDGE: On November 6, 1979, Carl W. Brown defeated Earl J. Hartlage in an election for Jefferson County Commissioner for the C-District. Hartlage contested the election of Brown on the grounds of a public statement made by Brown and his running mate, Dr. Bill Creech, which he alleged violated the Kentucky Corrupt Practices Act. Brown and Creech had stated at a televised press conference on August 15, 1979 that they intended to cut their own salaries by $3,000.00 per year if elected. In an August 19, 1979 news conference, after being alerted to possible legal questions, they retracted the statement. Hartlage contended that the statement violated KRS 121.055. The Jefferson Circuit Court, although finding a violation of this section of the Corrupt Practices Act, adjudged

pursuant to KRS 120.165(4) that Brown had been fairly elected and refused to void the election. Hartlage appeals. A cross-appeal filed by Brown has been dismissed by reason of his failure to file a supersedeas bond.

The trial court found that Brown violated KRS 121.055. KRS 121.055 provides:

> No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contract with any person to vote for or support any particular individual, thing or measure, in consideration for the vote or the financial or moral support of that person in any election, primary or nominating convention, and no person shall demand that any candidate make such a promise, agreement or contract.

The appellee, by his brief and oral argument, insists that the trial court erred in this holding and also its holding that the appellant could maintain this contest action as appellant himself, "violated certain provisions of the Corrupt Practice Act." Both these arguments appear to be matters to be considered on cross-appeal, which has previously been dismissed in this case by this court. Be that as it may, we agree with the finding of the trial court that all the defenses raised by the appellee "failed to block Hartlage from asserting the claim in the Petition either legally or equitably." The appellee either failed to prove his asserted defenses, or there had been substantial compliance or the violation, if any, was "de minimis."

Appellee contends that the trial court erred in determining that Brown had violated KRS 121.055. He relies

on *Owsley* v. *Hill*, 210 Ky. 285, 275 S. W. 797 (1925). In that case Hill, a candidate for county attorney, proposed to have the fiscal court reduce the salary of the office by $400.00, and to have the court allot that sum to the county road fund. (The salary for the term of office for which Hill was campaigning had not been set in the manner required by law.) In that case, the statement was held not to be a violation of the Corrupt Practices Act.

After the decision in *Owsley* v. *Hill, supra,* the court interpreted KRS 123.040, a statute with wording almost identical to KRS 121.055, in *Sparks* v. *Boggs,* Ky., 339 S. W. 2d 480, 484 (1960). In that case, it was held that a promise by candidates for the office of city commissioner, whose salaries were fixed by statute, to serve for $1.00 per year and to vote to have the $2,000.00 savings to be distributed to specified religious, educational, charitable and recreational programs violated the Corrupt Practices Act. The election was held to be void. The court explained its holding as follows:

> It appears to us there can be no escape from the conclusion that a promise to take a reduction in the salary set by law for an elective public office, or an agreement to discharge the duties of the office gratis, advanced by one to induce votes for his candidacy, is so vicious in its tendency as to consitute a violation of the Corrupt Practices Act. To hold otherwise would permit the various elective public offices to become filled by those who would purchase their election thereto by making the most extravagant bid. The auction method of choosing a public officer would supplant the personal fitness test. Eventually most of the public offices would be occupied by the opulent, who could afford to serve without pay, or by the ambitious, who would serve only for the pittance of honor attached

to the office, or by the designing grafter, who would surely obtain his remuneration by methods which would not bear scrutiny. Under such a system good government would certainly vanish from every subdivision of the state.

In *Sparks* v. *Boggs*, the court explained the distinction between that case and *Owsley* v. *Hill*, *supra*, which resulted in a different disposition of the litigation:

> *The material difference* between the case of *Owsley* v. *Hill*, and the one at bar is that the annual salary of a commissioner for Hazard *had already been fixed by law* for the new term, whereas such had not been done in respect to the county attorney's office in controversy in *Owley* v. *Hill*.
>
> . . . .
>
> As their rate of pay had already been legally fixed at $500 per year, the amount of salary they were entitled to receive upon taking office could not be altered. Section 161 of the Constitution of Kentucky plainly prohibited such contemplated action npon their part. The pertinent language of that section reads: "The compensation of any city, county, town, or municipal officer shall not be changed after his election or appointment; or during his term of office; * * *." The word "changed" implies that the compensation of an official may not be scaled up or scaled down. See also Section 235 of the Constitution of Kentucky. In view of the quoted constitutional inhibition, appellees gave out to the electorate a pledge they could not abide by. . . . [Emphasis added.]

It is quite apparent that the salary for this office was, like the salary in *Sparks* v. *Boggs*, fixed by law. KRS

64.530(4) states that salaries for county officers elected by popular vote shall be set by the fiscal court "not later than the first Monday in May in the year in which the officers are elected, and the compensation of the officer shall not be changed during the term. . . ." Brown promised to do an act that he could not legally do. Further, his statement was a promise to the taxpayers to reduce pro tanto the amount of taxes each taxpayer must pay. It is stated in *Sparks* v. *Boggs, supra:*

> The general rule on the question before us is thus stated in 43 Am. Jur., Public Officers, sec. 374, p. 159: "An agreement by a candidate for office that if chosen he will discharge the duties of the office without compensation or for a lesser compensation than that provided by law, or will pay part of his salary into the public treasury, is illegal, whether made in good faith or not. The underlying principle of the decisions (on this point) is that when a candidate offers to discharge the duties of an elective office for less than the salary fixed by law, a salary which must be paid by taxation, he offers to reduce pro tanto the amount of taxes each indivdiual taxpayer must pay, and thus makes an offer to the voter of pecuniary gain.
>
> It appears to us there can be no escape from the conclusion that a promise to take a reduction in the salary set by law for an elective public office, or an agreement to discharge the duties of the office gratis, advanced by one to induce votes for his candidacy, is so vicious in its tendency as to constitute a violation of the Corrupt Practices Act.

It is clear that although Brown may have acted in good faith the trial court correctly held he had in fact violated the Corrupt Practices Act. Under this statute and our case

law, this court cannot reach any conclusion other than the appellee violated KRS 121.055.

What was the effect of that violation? KRS 120.015 provides that in contest actions, where it is alleged that the provisions of KRS 121.055 were violated, and upon trial it appears that the provisions have been violated by the contestee or by others in his behalf with his knowledge, *the nomination or election of the contestee shall be declared void.* Violations of the Corrupt Practices Act through promises similar to the one made by Brown resulted in voiding of elections in *Draughn* v. *Martin*, Ky., 350 S. W. 2d 161 (1961); *Sparks, supra*, and *Kluemper* v. *Zimmer*, 240 Ky. 225, 41 S. W. 2d 111 (1931). We find no exception in the statute where the statement is retracted, nor do we find any Kentucky case indicating that retraction is a defense. Although the retraction received similar publicity, there is no way of knowing whether it reached the same members of the voting public who heard the original statement. In litigation initiated to compel the Nebraska Secretary of State to accept one Burkett's filing as a candidate, the Supreme Court of Nebraska held that Burkett should not be on the ballot in spite of his offer to repudiate a statement that he would serve without pay so long as the budget remained unbalanced. *State ex rel. Burkett* v. *Swanson*, 291 N. W. 481 (Neb. 1940). We hold that the retraction did not constitute a defense.

The trial court held, and appellee insists, that KRS 120.165(4) is inconsistent with KRS 120.015 and applying KRS 120.165(4) after reviewing the whole record, Brown was fairly elected and KRS 120.165(4) overcomes the mandatory application of KRS 120.015.

These conclusions and holding are clearly erroneous. KRS 120.165(4) has no applicability to this action as this contest was brought under and tried under KRS 120.015. This latter statute specifically treats the violation of the

Corrupt Practices Act, charged herein, viz. KRS 121.055. As between legislation of broad and general nature and legislation dealing minutely with specific matter on the other hand, the specific prevails over the general. *City of Bowling Green* v. *Board of Education of Bowling Green Independent School District*, Ky., 443 S. W. 2d 243, 247 (1969). If there is any inconsistency, which we fail to find, then the inconsistency must be resolved in favor of the specific statute, KRS 120.015, which mandatorily requires voiding of an election where KRS 121.055 is violated by the contestee.

The other considerations of the trial court likewise, have no applicability. As previously discussed in this opinion, retraction of the illegal statement, and no retreat from the retraction, is of no consequence under the law of this state; likewise there is no authority to disregard a mandatory statute because of balancing the violation against disenfranchisement, presumption of will of the people and defeat of Brown's running mate who made the same statements. Neither can we agree that Brown was fairly elected in face of his violation of the Corrupt Practice Act.

The law and courts look with disfavor on disfranchisement and this is very true in this case. Although considerations of good faith and balancing of rights may be proper in a contest under KRS 120.165(4), they have no applicability here because, as already pointed out, this action bas based on violation of KRS 121.055, one of the specifically identified prohibited acts under KRS 120.015. There is no authority under this section to entertain such defenses. The only result the court can adjudge is to void this election and to hold otherwise is error. *Sparks* v. *Boggs, supra; Brewer* v. *Compton*, Ky., 122 S. W. 2d 1024 (1938).

The final question for consideration is whether Brown's statement is protected by the United States Constitution. To hold that promises to serve at reduced compensation in violation of the Corrupt Practices Act are immune from regulation in view of the provisions of the United States Constitution is to open the door to arguments that other statements in violation of the Corrupt Practices Act are protected because they involve speech and self-expression.

> Constitutional rights of liberty of speech and of the press are subject to such reasonable regulations as are necessary to promote and preserve public welfare. The preferred position of freedom of speech does not require legislators to be insensible to claims by citizens to comfort and convenience. A state may punish those who abuse the constitutional freedom of speech by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace. 16 Am. Jur. 2d *Constitutional Law* §409.
>
> It is well settled that the rights of free speech and press are subject to legislative restriction, within proper limits. The First Amendment does not forbid a regulation which ends in no restraint upon expression or in any other evil outlawed by the Amendment's terms and purposes. It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. And the prohibition of legislation against free speech is not intended to give immunity for every use or abuse of language, the right of free speech and press does not prevent the punishment of those who abuse this freedom, and does not imply the right to paralyze the means for effective protection of all the freedoms

secured by the Bill of Rights, nor the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all depends. 16 Am. Jur. 2d *Constitutional Law* §507.

We hold that the statement was not constitutionally protected.

The judgment is reversed with directions to enter a new judgment voiding the appellee's election.

ALL CONCUR.

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OPINION RENDERED: OCTOBER 29, 1980
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 80-CA-385-MR

EARL J. HARTLAGE - - - - - - *Appellant*

v.

CARL W. BROWN - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Michael O. McDonald, Judge
Action No. 79-CI-11292

OPINION AND ORDER DENYING PETITION FOR REHEARING—Entered October 29, 1980

BEFORE: HOGGE, GUDGEL and VANCE, Judges.

GUDGEL, JUDGE. In his Petition for Rehearing the appellee contends that this Court has misconceived fifth amendment freedom of speech issues and overlooked recent decisions of the United States Supreme Court applicable thereto. Specifically, appellee relies upon *Consolidated Edison Co.* v. *Public Service Commission*, ____ U. S. ____, 48 USLW 4776 (June 20, 1980); *First National Bank* v. *Bellotti*, 435 U. S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978); and *Buckley* v. *Valeo*, 424 U. S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), none of which were cited to this Court in his original brief.

The cases relied upon by appellant are not controlling when applied to the factual situation which is present in this case. Without question a state may not censor what a candidate for public office may say to the electorate. There is a compelling state interest, however, in the fairness and integrity of elections, and a state may require that elections be conducted free of corruption and bribery.

Our state has defined by statute what constitutes corruption in an election. It condemns an attempt to buy votes. Our highest court has specifically held that a promise by a candidate to take a reduction in the salary set by law for an elective office and a promise to discharge the duties of the office without pay is so vicious in its tendencies as to constitute a violation of the Corrupt Practices Act. The court's reasoning is premised on the belief that such a promise is an attempt to buy votes or to bribe the voters. *Sparks* v. *Boggs*, Ky., 339 S. W. 2d 480 (1960). We are bound by that decision. The refusal of this Court to follow precedent established by our Supreme Court would constitute nothing less than judicial anarchy.

The cases relied upon by appellee do not hold, and appellee does not go so far as to argue, that a state does not have a constitutional right to void an election for bribery simply because the offer of the bribe involved the use of speech. What appellee really argues is that the holding of *Sparks* v. *Boggs*, *supra*, is unconstitutionally broad for the reason that a holding in 1980 that a promise to serve in office at reduced pay can be equated with vote buying is an unconstitutional limitation on the freedom of speech. If carried to its logical extreme, he contends, any promise by a candidate to increase the efficiency and thus lower the cost of government might likewise be considered as an attempt to buy votes. This contention is not without logic or appeal, but since it strikes at the heart of *Sparks* v.

Boggs, supra, it must be addressed to a court which has the power to overturn or modify that decision.

The Petition for Rehearing is DENIED.

ALL CONCUR.

/s/ Paul D. Gudgel
Judge, Court of Appeals

ENTERED: October 29, 1980

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SUPREME COURT OF KENTUCKY

80-SC-770-D
(80-CA-385-MR)

CARL W. BROWN - - - - - - - *Movant*

v.

EARL J. HARTLAGE - - - - - *Respondent*

Jefferson Circuit Court
No. 79-CI-11393

ORDER DENYING DISCRETIONARY REVIEW—
Entered December 9, 1980

The motion of Carl W. Brown for a review of the decision of the Court of Appeals is denied.

Palmore, C. J., and Aker, Clayton, Lukowsky, and Stephenson, JJ., sitting. All concur.

ENTERED: December 9, 1980.

/s/ John S. Palmore
Chief Justice

COURT OF APPEALS OF KENTUCKY

No. 80-CA-385-MR

EARL J. HARTLAGE - - - - - - *Appellant*

v.

CARL W. BROWN - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
No. 79-CI-11292

ORDER—Entered December 10, 1980

The appellee, having moved for immediate relief staying or recalling the mandate of this court issued or to be issued in the above-styled proceedings, and it appearing that the enforcement of such mandate should be stayed until a hearing can be held upon the motion, it is hereby ORDERED that the enforcement of the mandate of this Court be STAYED pending further orders of the Court. A hearing upon the motion will be held at 10:00 a.m., December 16, 1980, at the Central Office of the Court of Appeals, 403 Wapping Street, Frankfort, Kentucky.

(s) Roy N. Vance
Judge, Court of Appeals

COURT OF APPEALS OF KENTUCKY

No. 80-CA-385-MR

EARL J. HARTLAGE - - - - - - *Appellant*

v.

CARL W. BROWN - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Michael O. McDonald, Judge
Action No. 79-CI-11292

ORDER—Entered December 16, 1980

BEFORE: WILHOIT, VANCE, and WINTERSHEIMER.

The appellee, having moved for immediate relief staying or recalling the mandate of this Court which issued on December 10, 1980, in the above-styled proceedings, and the Court having heard argument of counsel, it appears that the enforcement of such mandate of this Court should be STAYED until March 9, 1981, and the Court being sufficiently advised, it is so ORDERED.

(s) Anthony M. Wilhoit
Judge, Court of Appeals

COURT OF APPEALS OF KENTUCKY

No. 80-CA-385-MR

EARL J. HARTLAGE - - - - - - *Appellant*

v.

CARL W. BROWN - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Michael O. McDonald, Judge
No. 79-CI-11292

ORDER—Entered December 16, 1980

BEFORE: WILHOIT, VANCE, and WINTERSHEIMER, JUDGES.

This cause having come before the Court on motion for leave to substitute Fred M. Goldberg and Jonathan D. Goldberg, as counsel for the appellee herein, Carl W. Brown, and it appearing that the firm of Handmaker, Weber & Meyer, and the said Carl W. Brown have agreed to such motion, and the Court being otherwise sufficiently advised, it is hereby so ORDERED.

(s) Anthony M. Wilhoit
Judge, Court of Appeals

SUPREME COURT OF THE UNITED STATES

No. A-705 (80-1285)

CARL W. BROWN, - - - - - - - *Petitioner*

v.

EARL J. HARTLAGE, - - - - - *Respondent.*

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the mandate of the Court of Appeals of Kentucky, No. 80-CA-385-MR, be, and the same is hereby, stayed pending disposition of the pretition for writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

/s/ Potter Stewart

Associate Justice of the Supreme
Court of the United States

Dated this 18th day of February, 1981.

Office-Supreme Court, U.S.
FILED
FEB 27 1981
ALEXANDER L. STEVAS,
CLERK

No. A-705 (80-1285)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CARL W. BROWN - - - - - Petitioner

vs.

EARL J. HARTLAGE - - - - Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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February 25, 1981

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. A-705 (80-1285)

CARL W. BROWN, - - - - - *Petitioner*

v.

EARL J. HARTLAGE, - - - - *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

STATEMENT OF THE CASE

This action involves an election contest between Respondent and Petitioner.

Petitioner was the Republican Party nominee for the office of C-District Commissioner, Jefferson Fiscal Court, Jefferson County, Kentucky, in the general election for said office held on November 6, 1979. The Petitioner's opponent in said election was the Respondent who was the incumbent and the Democratic Party nominee.

During the course of the campaign, the Petitioner specifically promised that he would reduce the salary for the office he was seeking and thereby save the taxpayers of Jefferson County, Kentucky, an amount equal to $3,000 per year for each year he held office.

The Petitioner was certified as the winner of said election.

On December 4, 1979, the Respondent filed a Petition to Void Election. (App. D). The Respondent alleged that the Petitioner's promise to cut the salary fixed by law for the office sought was a violation of KRS 121.055 and therefore, pursuant to KRS 120.015, the election should be declared void.

A trial was conducted and the trial court returned its Findings of Fact, Conclusions of Law and Opinion on February 6, 1980. (App. C). Therein, the court rejected each and every defense raised by the Petitioner, including the allegedly available defense of retraction.

Further, the trial court found and concluded that the Petitioner had clearly violated KRS 121.055 of the Kentucky Corrupt Practices Act and, "in keeping with the seriousness of the condemnation" of Petitioner's conduct, the court taxed the costs of the action against the Petitioner. (App. C, p. 29). However, the trial court did not void the election of the Petitioner. A Judgment consistent with the foregoing was entered on February 12, 1980. (App. C, pp. 31-32).

The Respondent appealed to the Kentucky Court of Appeals, the intermediate appellate court of Kentucky, claiming as his sole assignment of error that the trial court had erred in not voiding the election when judgment had been entered declaring a violation of KRS 121.055. The Petitioner's attempted cross-appeal was dismissed because it was not properly perfected. (App. A, p. 12).

On August 8, 1980, the Kentucky Court of Appeals rendered its unanimous, unpublished opinion that the trial court erred and that a new judgment should be entered voiding the election of the Petitioner. (App. A).

The Court of Appeals agreed with the trial court's rejection of each and every defense raised by the Petitioner. Further, the Court of Appeals held definitively:

> (1) The inescapable conclusion was that the Petitioner violated the statute;
>
> (2) The trial court's failure to void the election was clearly erroneous;
>
> (3) Retraction of such an illegal promise is no defense under the law of Kentucky;
>
> (4) The Petitioner was not fairly elected even though the fairness of the election is irrelevant when such a violation is present;

The Petitioner's rehearing petition was denied by the Court of Appeals. His Motion for Discretionary Review by the Supreme Court of Kentucky was unanimously denied. (App. B).

On additional fact should be clarified. The Petitioner continues to the point of his Petition here to assert, in his words, his "immediate and complete retraction" of the illegal promise. As the Court of Appeals held, retraction is not a defense under Kentucky law. In any event, the trial court best described Petitioner's so-called "immediate and complete retraction" as follows:

". . . The retraction press conference of August 19, 1979, when reviewed, was not that of a remorseful penitent. The retraction statement did not admit a violation or that the statements were violations, but that the statements raised a reasonable question of violation as a result of silly law. The retraction accused the branches of government of being in cahoot with one another and scratching one another's back." (App. C, pp. 23-24).

SUMMARY OF ARGUMENT

Despite the Petitioner's vigorous line-drawing in his attempt to create a legitimate federal question, this case has never involved anything more than the Petitioner's clear violation of a Kentucky corrupt election practice statute. No federal question or constitutional issue is present.

ARGUMENT

Certainly no citation of authority is necessary to support the statement that the Commonwealth of Kentucky is a sovereign state charged with the duty and clothed with the power to govern and to maintain its own separate branches of government.

Specifically, with reference to candidates for public office, Sections 150 and 151 of the Kentucky Constitution, respectively provide:

"Every person shall be disqualified from holding any office of trust or profit for the term for which he shall have been elected who shall be convicted of having given, or consented to the giving,

offer or promise of any money or other thing of value, to procure his election, or to influence the vote of any voter at such election . . ." (Section 150)

"The General Assembly shall provide suitable means for depriving of office any person who, to procure his nomination or election, has, in his canvass or election, been guilty of any unlawful use of money, or other thing of value, or has been guilty of fraud, intimidation, bribery, or any other corrupt practice, and he shall be held responsible for acts done by others with his authority, or ratified by him." (Section 151)

In response to this constitutional mandate, the General Assembly of Kentucky enacted a number of specific statutory prohibitions which have been periodically re-codified. Of course, one of those provisions, KRS 121.055, is the statute applicable here. KRS 121.055, re-codified by the 1980 General Assembly of Kentucky, provides in pertinent part:

"No candidate for . . . election to any state, county, city or district office shall . . . promise . . . money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person."

In addressing the issue of what constitutes a violation by a candidate of this statute, the highest court of Kentucky has held conclusively and repeatedly that a promise by a candidate to serve for less than his salary fixed by law is prohibited. *Sparks* v. *Boggs*, Ky., 339

S. W. 2d 480 (1961); *Kluemper* v. *Zimmer,* Ky., 41 S. W. 2d 1111 (1931); *Owsley* v. *Hill,* Ky., 275 S. W. 797 (1925) (Distinguished because the candidate's salary was not fixed by law).

This long-standing interpretation then is as much an integral part of the Kentucky statutory proviso as is this Court's approved interpretation of any Act of Congress. *Gulf, C. & S. F. R. Co.* v. *Moser,* 275 U. S. 133 (1927); *Allied Stores of Ohio* v. *Bowers,* 358 U. S. 522 (1959).

While the justification for this prohibition is clear enough from the Constitution, statutes and decisions of the highest court of Kentucky, it seems appropriate to set out the following opinion of Mr. Justice Brewer, formerly of this Court, as delivered in the case of *State* v. *Elting,* 29 Kan. 397, and as cited by the Supreme Court of Montana in *Tipton* v. *Sands,* Mont., 60 P. 2d 662, 106 ALR 474 (1936):

> "When a candidate gives an elector personally money or property, there is a direct attempt to influence his vote by pecuniary considerations. The expectation is that such vote will be controlled, not by the elector's judgment of the fitness of the candidate for the office, but by the pecuniary benefit he has received. In other words, it is money and not judgment which directs the ballot; and so the election turns not on considerations of fitness or public good, but of private gain. Let such be tolerated, and elections will be simply the measure of the size of the candidates' purses . . ."
>
> "Salaries are paid by taxation, and when a candidate offers to take less than the stated salary,

he offers to reduce pro tanto the amount of taxes which each individual must pay. If the candidate went to each elector and offered to pay one dollar of his taxes, that clearly would be direct bribery; and when he offers to take such a salary as will reduce the tax upon each taxpayer one dollar, he is indirectly making the same offer of pecuniary gain to the voter; so that those cases rest upon the simple proposition that the election of a candidate for office cannot be secured by personal bribery offered directly or indirectly to the voter. . . ."

". . . The theory of popular government is that the most worthy should hold the offices. Personal fitness—and in that is included moral character, intellectual ability, social standing, habits of life, and political convictions—is the single test which the law will recognize. That which throws other considerations into the scale, and to that extent tends to weaken the power of personal fitness, should not be tolerated. It tends to turn away the thought of the voter from the one question which should be paramount in his mind when he deposits his ballot. It is, in spirit at least, bribery, more insidious, and therefore more dangerous, than the grosser form of directly offering money to the voter."

In the final analysis, there is nothing unclear or vague about the literal and interpreted proviso of KRS 121.055. It is specifically the law of Kentucky that a candidate cannot *promise* to serve for less. Neither the statute as written nor interpreted in any manner prohibits the exposition by a candidate of his views on legitimate public issues.

By a convoluted attempt to apply a number of inapplicable decisions of this Court to the matter at bar, the Petitioner in effect asserts that he may promise to serve for less because he "spoke" the promise. At the risk of overkill, would the Petitioner contend that he could, once elected, threaten a public employee with termination if the employee did not support him in his re-election bid; simply because he "spoke" the threat?

Plainly, this is not a First Amendment case presenting a legitimate federal question of any kind. It is a mere local election contest case, the outcome of which is dependent exclusively upon the application of the Kentucky Constitution and a specific Kentucky statute. *Taylor* v. *Beckham,* 178 U. S. 548 (1900); *Elder* v. *Colorado,* 204 U. S. 85 (1970).

It was the determination of both the trial court and the Court of Appeals of Kentucky that Petitioner violated the statute. He presented no recognized or valid defense to his violation. Therefore, under Kentucky law, his election is void. (KRS 120.015).

CONCLUSION

There being no special and important reason nor federal question presented by the Petitioner for this Court to consider this matter further, the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION RENDERED: AUGUST 8, 1980; 10:00 A.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 80-CA-385-MR

EARL J. HARTLAGE - - - - - - *Appellant*

v.

CARL W. BROWN - - - - - - - *Appellee*

Appeal from Jefferson Circuit Court
Honorable Michael O. McDonald, Judge
Action No. 79-CI-11292

REVERSING

BEFORE: VANCE, HOGGE and GUDGEL, Judges.

HOGGE, JUDGE: On November 6, 1979, Carl W. Brown defeated Earl J. Hartlage in an election for Jefferson County Commissioner for the C-District. Hartlage contested the election of Brown on the grounds of a public statement made by Brown and his running mate, Dr. Bill Creech, which he alleged violated the Kentucky Corrupt Practices Act. Brown and Creech had stated at a televised press conference on August 15, 1979 that they intended to cut their own salaries by $3,000.00 per year if elected. In an August 19, 1979 news conference, after being alerted to possible legal questions, they retracted the statement. Hartlage contended that the statement violated KRS 121.055. The Jefferson Circuit Court, although finding a violation of this section of the Corrupt Practices Act, adjudged

pursuant to KRS 120.165(4) that Brown had been fairly elected and refused to void the election. Hartlage appeals. A cross-appeal filed by Brown has been dismissed by reason of his failure to file a supersedeas bond.

The trial court found that Brown violated KRS 121.055. KRS 121.055 provides:

> No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or made a contract with any person to vote for or support any particular individual, thing or measure, in consideration for the vote or the financial or moral support of that person in any election, primary or nominating convention, and no person shall demand that any candidate make such a promise, agreement or contract.

The appellee, by his brief and oral argument, insists that the trial court erred in this holding and also its holding that the appellant could maintain this contest action as appellant himself, "violated certain provisions of the Corrupt Practice Act." Both these arguments appear to be matters to be considered on cross-appeal, which has previously been dismissed in this case by this court. Be that as it may, we agree with the finding of the trial court that all the defenses raised by the appellee "failed to block Hartlage from asserting the claim in the Petition either legally or equitably." The appellee either failed to prove his asserted defenses, or there had been substantial compliance or the violation, if any, was "de minimis."

Appellee contends that the trial court erred in determining that Brown had violated KRS 121.055. He relies

on *Owsley* v. *Hill*, 210 Ky. 285, 275 S. W. 797 (1925). In that case Hill, a candidate for county attorney, proposed to have the fiscal court reduce the salary of the office by $400.00, and to have the court allot that sum to the county road fund. (The salary for the term of office for which Hill was campaigning had not been set in the manner required by law.) In that case, the statement was held not to be a violation of the Corrupt Practices Act.

After the decision in *Owsley* v. *Hill, supra,* the court interpreted KRS 123.040, a statute with wording almost identical to KRS 121.055, in *Sparks* v. *Boggs,* Ky., 339 S. W. 2d 480, 484 (1960). In that case, it was held that a promise by candidates for the office of city commissioner, whose salaries were fixed by statute, to serve for $1.00 per year and to vote to have the $2,000.00 savings to be distributed to specified religious, educational, charitable and recreational programs violated the Corrupt Practices Act. The election was held to be void. The court explained its holding as follows:

> It appears to us there can be no escape from the conclusion that a promise to take a reduction in the salary set by law for an elective public office, or an agreement to discharge the duties of the office gratis, advanced by one to induce votes for his candidacy, is so vicious in its tendency as to constitute a violation of the Corrupt Practices Act. To hold otherwise would permit the various elective public offices to become filled by those who would purchase their election thereto by making the most extravagant bid. The auction method of choosing a public officer would supplant the personal fitness test. Eventually most of the public offices would be occupied by the opulent, who could afford to serve without pay, or by the ambitious, who would serve only for the pittance of honor attached

to the office, or by the designing grafter, who would surely obtain his remuneration by methods which would not bear scrutiny. Under such a system good government would certainly vanish from every subdivision of the state.

In *Sparks* v. *Boggs*, the court explained the distinction between that case and *Owsley* v. *Hill, supra*, which resulted in a different disposition of the litigation:

> *The material difference* between the case of *Owsley* v. *Hill*, and the one at bar is that the annual salary of a commissioner for Hazard *had already been fixed by law* for the new term, whereas such had not been done in respect to the county attorney's office in controversy in *Owsley* v. *Hill*.
>
> . . . .
>
> As their rate of pay had already been legally fixed at $500 per year, the amount of salary they were entitled to receive upon taking office could not be altered. Section 161 of the Constitution of Kentucky plainly prohibited such contemplated action upon their part. The pertinent language of that section reads: "The compensation of any city, county, town, or municipal officer shall not be changed after his election or appointment; or during his term of office; * * *." The word "changed" implies that the compensation of an official may not be scaled up or scaled down. See also Section 235 of the Constitution of Kentucky. In view of the quoted constitutional inhibition, appellees gave out to the electorate a pledge they could not abide by. . . . [Emphasis added.]

It is quite apparent that the salary for this office was, like the salary in *Sparks* v. *Boggs*, fixed by law. KRS

64.530(4) states that salaries for county officers elected by popular vote shall be set by the fiscal court "not later than the first Monday in May in the year in which the officers are elected, and the compensation of the officer shall not be changed during the term. . . ." Brown promised to do an act that he could not legally do. Further, his statement was a promise to the taxpayers to reduce pro tanto the amount of taxes each taxpayer must pay. It is stated in *Sparks* v. *Boggs, supra:*

> The general rule on the question before us is thus stated in 43 Am. Jur., Public Officers, sec. 374, p. 159: "An agreement by a candidate for office that if chosen he will discharge the duties of the office without compensation or for a lesser compensation than that provided by law, or will pay part of his salary into the public treasury, is illegal, whether made in good faith or not. The underlying principle of the decisions (on this point) is that when a candidate offers to discharge the duties of an elective office for less than the salary fixed by law, a salary which must be paid by taxation, he offers to reduce pro tanto the amount of taxes each individual taxpayer must pay, and thus makes an offer to the voter of pecuniary gain.
>
> It appears to us there can be no escape from the conclusion that a promise to take a reduction in the salary set by law for an elective public office, or an agreement to discharge the duties of the office gratis, advanced by one to induce votes for his candidacy, is so vicious in its tendency as to constitute a violation of the Corrupt Practices Act.

It is clear that although Brown may have acted in good faith the trial court correctly held he had in fact violated the Corrupt Practices Act. Under this statute and our case

law, this court cannot reach any conclusion other than the appellee violated KRS 121.055.

What was the effect of that violation? KRS 120.015 provides that in contest actions, where it is alleged that the provisions of KRS 121.055 were violated, and upon trial it appears that the provisions have been violated by the contestee or by others in his behalf with his knowledge, *the nomination or election of the contestee shall be declared void.* Violations of the Corrupt Practices Act through promises similar to the one made by Brown resulted in voiding of elections in *Draughn* v. *Martin,* Ky., 350 S. W. 2d 161 (1961); *Sparks, supra,* and *Kluemper* v. *Zimmer,* 240 Ky. 225, 41 S. W. 2d 1111 (1931). We find no exception in the statute where the statement is retracted, nor do we find any Kentucky case indicating that retraction is a defense. Although the retraction received similar publicity, there is no way of knowing whether it reached the same members of the voting public who heard the original statement. In litigation initiated to compel the Nebraska Secretary of State to accept one Burkett's filing as a candidate, the Supreme Court of Nebraska held that Burkett should not be on the ballot in spite of his offer to repudiate a statement that he would serve without pay so long as the budget remained unbalanced. *State ex rel. Burkett* v. *Swanson,* 291 N. W. 481 (Neb. 1940). We hold that the retraction did not constitute a defense.

The trial court held, and appellee insists, that KRS 120.165(4) is inconsistent with KRS 120.015 and applying KRS 120.165(4) after reviewing the whole record, Brown was fairly elected and KRS 120.165(4) overcomes the mandatory application of KRS 120.015.

These conclusions and holding are clearly erroneous. KRS 120.165(4) has no applicability to this action as this contest was brought under and tried under KRS 120.015. This latter statute specifically treats the violation of the

Corrupt Practices Act, charged herein, viz. KRS 121.055. As between legislation of broad and general nature and legislation dealing minutely with specific matter on the other hand, the specific prevails over the general. *City of Bowling Green* v. *Board of Education of Bowling Green Independent School District,* Ky., 443 S. W. 2d 243, 247 (1969). If there is any inconsistency, which we fail to find, then the inconsistency must be resolved in favor of the specific statute, KRS 120.015, which mandatorily requires voiding of an election where KRS 121.055 is violated by the contestee.

The other considerations of the trial court likewise, have no applicability. As previously discussed in this opinion, retraction of the illegal statement, and no retreat from the retraction, is of no consequence under the law of this state; likewise there is no authority to disregard a mandatory statute because of balancing the violation against disenfranchisement, presumption of will of the people and defeat of Brown's running mate who made the same statements. Neither can we agree that Brown was fairly elected in face of his violation of the Corrupt Practice Act.

The law and courts look with disfavor on disfranchisement and this is very true in this case. Although considerations of good faith and balancing of rights may be proper in a contest under KRS 120.165(4), they have no applicability here because, as already pointed out, this action was based on violation of KRS 121.055, one of the specifically identified prohibited acts under KRS 120.015. There is no authority under this section to entertain such defenses. The only result the court can adjudge is to void this election and to hold otherwise is error. *Sparks* v. *Boggs, supra; Brewer* v. *Compton,* Ky., 122 S. W. 2d 1024 (1938).

The final question for consideration is whether Brown's statement is protected by the United States Constitution. To hold that promises to serve at reduced compensation in violation of the Corrupt Practices Act are immune from regulation in view of the provisions of the United States Constitution is to open the door to arguments that other statements in violation of the Corrupt Practices Act are protected because they involve speech and self-expression.

> Constitutional rights of liberty of speech and of the press are subject to such reasonable regulations as are necessary to promote and preserve public welfare. The preferred position of freedom of speech does not require legislators to be insensible to claims by citizens to comfort and convenience. A state may punish those who abuse the constitutional freedom of speech by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace. 16 Am. Jur. 2d *Constitutional Law* §409.
>
> It is well settled that the rights of free speech and press are subject to legislative restriction, within proper limits. The First Amendment does not forbid a regulation which ends in no restraint upon expression or in any other evil outlawed by the Amendment's terms and purposes. It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. And the prohibition of legislation against free speech is not intended to give immunity for every use or abuse of language, the right of free speech and press does not prevent the punishment of those who abuse this freedom, and does not imply the right to paralyze the means for effective protection of all the freedoms

secured by the Bill of Rights, nor the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all depends. 16 Am. Jur. 2d *Constitutional Law* §507.

We hold that the statement was not constitutionally protected.

The judgment is reversed with directions to enter a new judgment voiding the appellee's election.

ALL CONCUR.

Attorneys for Appellant:

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APPENDIX B

SUPREME COURT OF KENTUCKY

80-SC-770-D
(80-CA-385-MR)

CARL W. BROWN - - - - - - - *Movant*

v.

EARL J. HARTLAGE - - - - - *Respondent*

Jefferson Circuit Court
No. 79-CI-11292

ORDER DENYING DISCRETIONARY REVIEW—
Entered December 9, 1980

The motion of Carl W. Brown for a review of the decision of the Court of Appeals is denied.

Palmore, C. J., and Aker, Clayton, Lukowsky, and Stephenson, JJ., sitting. All concur.

ENTERED: December 9, 1980.

/s/ John S. Palmore
Chief Justice

APPENDIX C

JEFFERSON CIRCUIT COURT

SEVENTH DIVISION

No. 79CI11292

EARL J. HARTLAGE - - - - - - - - *Plaintiff*

v.

CARL W. BROWN - - - - - - - - *Defendant*

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND OPINION

This case was tried, pursuant to KRS 120.165, on January 29 and 30, 1980, without a jury, and is of record.

On December 4, 1979, the plaintiff-contestant, Earl J. Hartlage, filed a petition against the defendant-contestee, Carl W. Brown, alleging that Brown violated the Kentucky Corrupt Practices Act, specifically, KRS 121.055. Because of the violation, Hartlage demands that Brown's election to the office of Jefferson County Commissioner, "C" District, be voided, and the office vacated by Brown. (KRS 120.155 restricts the filing of a suit over a contest of a regular election to any candidate, provided that the candidate obtained not less than 25% of the votes cast for the successful candidate. *Dietz* v. *Zimmer,* 231 Ky. 546, 21 S. W. 2d 999 limits the suit for bringing the action to a defeated candidate.)

Both Hartlage and Brown were their respective party's nominees for the office in question from "C" District. "C"

District encompasses an area generally referred to as the southwest portion of Jefferson County, Kentucky. Hartlage was the Democratic nominee, and Brown, the Republican.

In the general election of November 6, 1979, Brown defeated Hartlage, the incumbent, by 10,151 votes. The candidates were voted for by the County-wide electorate; however, their primary races were confined to their respective district.

During the regular election campaign, on August 15, 1979, Brown, along with Dr. Bill Creech, "B" District Republican candidate, held a televised press conference and made the following statements:

Mr. Brown: ". . . with state law limiting their authority and responsibility (referring to County Commissioners) to legislation (KRS 67.080), it is clear that their jobs are simply not worth $20,000 a year each. It is ludicrous that part-time Commissioners nevertheless see fit to pay themselves the same amount as that paid the full-time County Judge. The mere fact that state law allows such outrageous levels of remuneration does not in itself justify these payments."

". . . using the gray fringes of the law for his own personal gain, Hartlage led the move to funnel County tax dollars into Commissioners' pockets."

Brown, during the same conference, supported and acquiesced in the following statement of Dr. Bill Creech:

Dr. Creech: "We abhor the Commissioners' outrageous salaries, and to prove the strength of our convictions, one of our first official acts as County Commissioners will be to lower our salary to a more realistic level. We will lower our salaries, saving the taxpayers $36,000 during our first term of office, by $3,000 each per year."

Later in the conference Brown went on to say, "These 2 proposals—cutting our own salaries and reorganizing the

Commissioners' office staff will save the taxpayers over $172,000 during our first term of office."

The Sunday after the press conference, a friend of Brown called to inform him that he may have violated the Corrupt Practices Act by making the statements mentioned in the press conference. Brown, a lawyer, personally researched the matter and concluded that a valid question could be raised on the statements as to whether they were violations. A retraction by Brown and Creech was made at a televised press conference on August 19, 1979. Partial statements are as follows:

"We are men enough to admit when we've made a mistake. We have discovered that there are Kentucky Court decisions . . . which indicate that our pledge to reduce our salaries, if elected, may be illegal." ". . . we do hereby rescind our pledge to reduce the County Commissioner's salary, if elected, and instead, pledge to seek corrective legislation in the next session of the general assembly, to correct this silly provisions of state law."

The Court will judicially note that Dr. Bill Creech was defeated by Jim "Pop" Malone in the regular election for "B" District Commissioner.

There is no Kentucky case law concerning the effect, if any, of a repudiation or retraction of this type pledge or promise to the public. However, a Nebraska case, *State ex rel. Burkett* v. *Swanson*, 291 N. W. 481 (1940) stands for the proposition that a withdrawal of a statement of this nature cannot be treated as a defense, but this precedent is not binding upon the Court.

The Court will comment on the retraction and repudiation of the offer to reduce the salary. The retraction press conference of August 19, 1979, when reviewed, was not that of a remorseful penitent. The retraction statement did not admit a violation, or that the statements were violations, but that the statements raised a reasonable question of

violation as a result of silly law. The retraction accused the branches of government of being in cahoot with one another and scratching one another's back. Brown and Creech further said that if there was a violation in what was said, Hartlage caused the violation by doubling his salary after his previous election.

The Petition further alleged that Brown made other statements in public concerning the salary reduction pledge; however, the Court finds no substance to this allegation. The evidence is plain that whenever the issue was discussed again, it was repudiated, and when it was discussed, the matter in controversy was put to Brown either by Mr. Hartlage at subsequent meetings of candidates, or by persons from an audience in a public forum. The evidence reveals no retreat by Brown from the retraction and repudiation that was publicly made August 19, 1979.

Brown, by his response to this action, offered various defenses to the allegation in the Petition. He admitted the statements were made on August 15, 1979. He asserts that the reduction in salary is within the confines of prescribed law; that there was no claim to serve without compensation, but contends the salary should be consistent with the duties of the office, which would dictate a reduction in salary; that Hartlage has no standing to bring the suit because he violated the Corrupt Practices Act himself, under KRS 120.-155, and therefore, the equitable doctrine of "clean hands" would apply and deny Hartlage's right to contest this election. Brown further contended that the retraction of August 19, 1979, cured any violation, if one existed.

The Court finds the defense is without substance. It was alleged that Hartlage made an agreement, contrary to law, with the Greater Louisville Central Labor Council, and with the Department of Human Services Employees Association for his endorsement in the election. The alleged agreement concerned a commitment by Mr. Hartlage over

collective bargaining rights for governmental employees. Actually, the evidence was to the contrary. It's also alleged that Hartlage failed to make election finance disclosures in a proper way by not filing the reports with the County Clerk, although the reports had been filed with the Registry. This was found to exist but was cured within a reasonable time after it was discovered, and the law was complied with. Therefore, the Court finds substantial compliance on this point. (See *Roberts* v. *Byrd,* 344 S. W. 2d 378 (1961).)

The only violation of Hartlage, about which Brown complains, really worth comment is the failure of Hartlage to have the disclaimer on his campaign locomotive. But this violation is so insignificant it does not reach the dignity of precluding Hartlage from bringing this suit. This violation is found by the Court to be *de minimis.*

In all, the defenses raised fail to block Hartlage from asserting the claim in the Petition either legally or equitably.

Therefore, one issue now before the Court is whether the pledge of Brown, in the statement of August 15, 1979, is a violation of the Corrupt Practices Act.

KRS 121.055 states as follows:

> *Candidates prohibited from making expenditure or loan, or agreement as to action when elected, to secure vote or support.*—No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contract with any person to vote for or support any particular individual, thing or measure, in consideration for the vote or the financial or moral sup-

port of that person in any election, primary or nominating convention, and no person shall demand that any candidate make such a promise, agreement or contract.

The Court answers the above question in the affirmative. *Sparks* v. *Boggs,* 339 S. W. 2d 480 (1960), is explicit on this point. It states, "It appears to us there can be no escape from the conclusion that a promise to take a reduction in salary set by law for an elected public office . . . advanced by one to induce votes for his candidacy, is so vicious in its tendency as to constitute a violation of the Corrupt Practices Act."

This leads us to the question as to whether the Commissioner's salary, as mentioned by Brown in his pledge, was set by law. There is no question in the Court's mind concerning this issue either, and the Court finds that the Commissioner's salary was set by law. KRS 64.530(5) fixes the monthly compensation of County officers elected by popular vote. The Commissioners are therein included. Further, KRS 64.527 permits the equating of Commissioners' salaries to present value of the purchasing dollar, or adjusting the compensation based upon the "rubber dollar" theory. To otherwise find would require manipulation of the law by legal gymnastics which this Court is unable to perform.

So, the Court having found there was a promise to reduce Brown's salary as set by law, it naturally follows there was a violation of the Corrupt Practices Act, specifically, KRS 121.055, and this finding is in compliance with the rationale of *Sparks* v. *Boggs, supra.*

Now, the question is whether the election of Brown should be voided and his office vacated. Hartlage argues that it's an automatic voiding of the election and vacating of the office if a violation of this nature is found to exist.

The cases cited refer to this type of promise as a bribery, and the only remedy, according to Hartlage, is the relief demanded by his Petition. Hartlage is not without legal support in that KRS 120.015 states that if a violation occurs the election shall be declared void.

The Court generally agrees with Hartlage except for the end result. The Court does not adjudge that the election should be voided and the office vacated. The Court's explanation is as follows:

There is reasoning given to us in *Owsley* v. *Hill*, 275 S. W. 797 (1925), that if the promise to reduce salary is made to the public at large, there is no violation. All other cases cited were promises of a reduction in salary for the benefit of specific groups and to accomplish a particular purpose. The beneficiaries in those cases included widows and orphans, religious groups, retarded children, Little League baseball, the hiring of a city manager, and so forth. In *Owsley* the candidate promised to reduce to a previously fixed sum and transfer the savings to a road fund for the County. Our highest Court said, "We cannot feel that this statute refers to promises made the entire people, and to hold otherwise would prevent any candidate from pledging himself to support measures designed to correct evils of which the people were complaining."

The *Sparks* case, however, appears to overrule *Owsley*, so it is inescapable to conclude that a violation of the Corrupt Practices Act did not occur. But the Court resists the proposition that automatic voiding of the election must necessarily follow because the Court further concludes that the law requires more.

KRS 120.165(4) states:

> If it appears from an inspection of the whole record that there has been such . . ., *bribery* . . . in the conduct of the election that neither contestant nor con-

> testee can be judged to have been fairly elected, the Circuit Court . . ., may adjudge that there has been no election.

The Court is led to believe that this statutory provision is inconsistent with KRS 120.015. KRS 120.165(4) speaks of bribery and the *Sparks* case and *Kluemper* v. *Zimmer*, 41 S. W. 2d 1115 (1931), declare these promises to be bribery. Applying KRS 120.165(4) further, and reviewing the whole record, considering the following:

1) the almost immediate retraction, by Brown;
2) no subsequent retreat by Brown from the retraction;
3) balancing the violation against disenfranchisement of thousands of votes;
4) the presumption of the will of the people in the election process; and
5) the defeat of Dr. Creech, Brown's running mate, who had made the same statements in the same county-wide election;

the Court adjudges, pursuant to KRS 120.165(4), that Brown was fairly elected. KRS 120.165(4) overcomes the mandatory application of KRS 120.015.

Previously, the Court faintly criticized Brown for saying the law is silly. Therefore, the Court will refer to the law as unique when the Court tries to grasp the reasoning of the legislature in these statutes. Under KRS 120.015, and since only a defeated candidate may file suit to contest the election, and further conditioned upon the defeated candidate obtaining 25% of the successful candidate's votes cast, if the successful candidate's promise is big enough, and the defeat is resounding enough, then there can be no contest over the violation.

Therefore, in keeping with the seriousness of the matter as the law so clearly requires, the defendant-contestee, Brown, is adjudged to have violated KRS 121.055; however, for the reasons above stated, his election is not voided. Further, in keeping with the seriousness of the condemnation of his campaign promise, the costs of this action shall be taxed against him. Either counsel may prepare judgment consistent herewith, with notice to opposing counsel.

/s/ Michael O. McDonald
Judge

Date:

cc: Victor L. Baltzell, Jr.
Richard D. Remmers

JEFFERSON CIRCUIT COURT

DIVISION SEVEN

No. 79-CI-11292

EARL J. HARTLAGE - - - - - - - *Plaintiff*

v.

CARL BROWN - - - - - - - - - *Defendant*

JUDGMENT

This cause having come on for a hearing before the Court, arguments for the Plaintiff and the Defendant having been fully presented, and the Court having entered its findings of fact and conclusions of law and opinion on February 6, 1980,

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. The findings of fact and conclusions of law and opinion entered on February 6, 1980, are incorporated herein by reference as if set out verbatim herein;

2. The relief sought in the petition is denied;

3. The election of Carl W. Brown as Commissioner of the Jefferson County Fiscal Court from C District, Jefferson County, Kentucky, is upheld;

4. The Defendant, Carl W. Brown, shall pay the costs of this action;

5. That pursuant to CR 54.02 this is a final and appealable order and there is no just reason for delay in its entry or execution.

/s/ Michael O. McDonald
Judge

Date: February 12, 1980

Tendered by:

/s/ Richard D. Remmers
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Henry S. Johnson
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589-6300

Have Seen; Notice of Filing Waived:

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APPENDIX D

JEFFERSON CIRCUIT COURT

SEVENTH DIVISION

No. 79CI-11292

EARL J. HARTLAGE - - - *Plaintiff-Contestant*
4115 Bramers Lane
Louisville, Kentucky 40216

v.

CARL W. BROWN - - - - - *Defendant-Contestee*
3431 Heatherfield Drive
Louisville, Kentucky 40216

PETITION TO VOID ELECTION

Comes the Plaintiff-Contestant, Earl J. Hartlage, and for his cause of action, states as follows, to-wit:

1. That Plaintiff-Contestant and Defendant-Contestee at all times herein mentioned were opposing candidates in the general election held on Tuesday, November 6, 1979, for election to the office of Jefferson County Commissioner, C District, Jefferson County, Kentucky, the Plaintiff-Contestant and Defendant-Contestee being candidates for election to that office by reason of their nomination as candidates thereto in the preceding primary election held on Tuesday, May 29, 1979.

2. That the Defendant-Contestee, personally and/or through others in his behalf with his knowledge, on or about August 15, 1979, and at other times prior to said election, in Jefferson County, Kentucky generally and publicly de-

clared, pledged and/or promised that, if elected, he would reduce the salary fixed by law for the holder of said office and that he would serve in such capacity as county commissioner for an amount less than that fixed by law for the compensation of the holder of said office.

3. That the aforesaid declaration, pledge and/or promise constituted a corrupt election practice in violation of KRS 121.055.

4. That by reason of the Defendant-Contestee's violation of KRS 121.055, the election of the Defendant-Contestee to the office of County Commissioner, C District, Jefferson County, Kentucky, shall be declared void as is provided in Kentucky Revised Statute 120.015.

5. That at all times herein mentioned, the Plaintiff-Contestant did not violate any of the provisions of KRS 121.055 or any other section of the Kentucky Revised Statute which sets forth a corrupt election practice.

6. That the Plaintiff-Contestant is duly qualified to contest the instant election by reason of his candidacy for said office and by reason of the number of votes cast for Plaintiff-Contestant in said election was greater than twenty-five percent (25%) of the number of votes cast for the Defendant-Contestee in said election.

7. That pursuant to Kentucky Revised Statute 120.165 (1), the within action shall have precedence over all other cases pending before the Jefferson Circuit Court.

WHEREFORE, the Plaintiff-Contestant, Earl J. Hartlage, demands as follows:

1. That Judgment be entered declaring void the election of the Defendant-Contestee to the office of Jefferson County Commissioner, C District, by reason of his violation of KRS 121.055 and Section 150 of the Kentucky Constitution, and that, therefore, a vacancy exists in said office;

2. That he recover his costs herein expended;

3. That he receive any and all other relief to which he may appear to be entitled.

Connelly, Kaercher, Baltzell & Stamper

/s/ Victor L. Baltzell, Jr.
Attorney for Plaintiff-Contestant
219 Marion E. Taylor Building
Louisville, Kentucky 40202
Phone: 589-2100

I have read the foregoing Petition and the allegations contained therein are true and accurate to the best of my knowledge and belief.

/s/ Earl J. Hartlage
Plaintiff-Contestant

Subscribed and sworn to before me by Earl J. Hartlage, this the 3rd day of December, 1979.

My commission expires: December 13, 1982

/s/ Bert Stamper
Notary Public, State at Large, Kentucky

Office-Supreme Court, U.S.
FILED
MAY 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1285

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CARL W. BROWN - - - - - - Petitioner

versus

EARL J. HARTLAGE - - - - - Respondent

On Writ of Certiorari to the Court of Appeals of Kentucky

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

(1)

Does Kentucky Revised Statute (KRS) 121.055, as interpreted by Kentucky Courts in voiding Petitioner's election for a campaign promise to serve as a public official for a salary which is less than permitted, violate the guarantee of unencumbered political speech accorded by the First and Fourteenth Amendment to the Constitution of the United States upon grounds of vagueness and overbreadth?

(2)

Is there a clear and present danger of sufficient magnitude to a compelling state interest such as to warrant the censoring of political speech protected by the First and Fourteenth Amendment to the Constitution of the United States as to void Petitioner's election where Petitioner made a campaign promise to serve as a public official for less than permitted, which was retracted four (4) days later, some 78 days prior to the election?

(3)

Whether the Kentucky Courts, in the voiding of Petitioner's election for the making of a campaign promise to serve as a public official for a salary which is less than permitted, have interpreted KRS 121.055 in such a manner as to violate the guarantee of unencumbered political speech accorded by the First and Fourteenth Amendment to the Constitution of the United States, by creating artificial distinctions for different forms of political speech?

PARTIES

The names of all the parties to this proceeding are stated in the caption of the case in this Court as given above.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1285

CARL W. BROWN - - - - - - *Petitioner*

v.

EARL J. HARTLAGE - - - - - *Respondent*

PETITIONER'S BRIEF ON THE MERITS

I. OPINIONS AND JUDGMENTS BELOW

The Order Denying Petitioner's Motion for Discretionary Review before the Supreme Court of Kentucky is not reported, J.A. 41, December 9, 1980.

Earlier opinions in the suit are also not reported, and are as follows:

- Findings of Fact, Conclusions of Law and Opinion, Jefferson Circuit Court, Jefferson County, Kentucky, on the merits, J.A. 18, February 6, 1980.
- Judgment of the Jefferson Circuit Court, Jefferson County, Kentucky, J.A. 27, February 12, 1980.
- Final Judgment and Opinion of the Court of Appeals of Kentucky, Commonwealth of Kentucky, J.A. 29, August 8, 1980.
- Opinion and Order Denying Petition for Rehearing, Court of Appeals of Kentucky, Com-

monwealth of Kentucky, J.A. 38, October 29, 1980.

Proceedings in the case subsequent to the Order Denying Petitioner's Motion for Discretionary Review also not reported were as follows:

- Orders entering a Stay of Court of Appeals of Kentucky Mandate, Court of Appeals of Kentucky, Commonwealth of Kentucky, J.A. 42-43, December 10, 1980 and December 16, 1980.
- Order for Substitution of Counsel, Court of Appeals of Kentucky, Commonwealth of Kentucky, J.A. 44, December 16, 1980.

II. JURISDICTION

The Order denying Petitioner's Motion for Discretionary Review in the Supreme Court of Kentucky was entered December 9, 1980, and the *Petition for Certiorari* was filed in this Court on January 26, 1981 within the time allowed by the United States Code, Title 28, Section 2101(c). The judgment of the Court of Appeals of Kentucky, of which review and reversal is here sought is a final judgment within the meaning of the jurisdictional statute, 28 U.S.C., Section 1257(3).

III. CONSTITUTIONAL AMENDMENTS, AND STATUTES INVOLVED

Petitioner's claim in this suit before this Court is based upon the free speech guarantee of the First Amendment to the Constitution of the United States made applicable to the States by the Fourteenth Amendment to the United States Constitution. This

matter is bottomed upon the fact that Petitioner has been denied his rights under these constitutional guarantees by the Kentucky Court of Appeals' interpretation of Kentucky Revised Statute ("KRS") 121.055. In developing the arguments herein contained, the Petitioner shall also rely on KRS 67.040, KRS 67.083, KRS 64.527, KRS 64.528 and KRS 64.530, all of which are Kentucky statutes dealing with the duties, responsibilities and compensation of Fiscal Court Commissioners. All of said statutes are contained in a Statutory Appendix, ("S.A.") made a part of this Brief.

IV. STATEMENT OF THE CASE

This matter is a request for relief by Petitioner from the final judgment of the Court of Appeals of Kentucky ("Court of Appeals"), Kentucky's intermediate appellate court. The Petitioner requested review of the decision of the Court of Appeals, but the Kentucky Supreme Court refused Petitioner's Motion for Discretionary Review and thus allowed the decision of the Court of Appeals to become the law of this case.

The matter at bar involved an election contest filed by Earl J. Hartlage ("Respondent"), a defeated Democratic incumbent Commissioner of the Jefferson County, Kentucky Fiscal Court.[1] Respondent con-

[1]In Kentucky, the office of the County Commissioner is elective. KRS 67.040. S.A., p. 6. In Jefferson County, Kentucky there are three such Commissioners who with the County Judge/Executive form the legislative branch of County government. KRS 67.083. S.A., p. 7.

tested the election of his successful Republican challenger Carl W. Brown, ("Petitioner"). Petitioner defeated Respondent in the November 6, 1979 election by a plurality of 10,151 votes.

Suit was filed by Respondent in the Jefferson Circuit Court to void the election of Petitioner. J.A., 9. Respondent alleged that Petitioner, and Petitioner's running mate for the office of Jefferson County Commissioner, Dr. Bill Creech ("Creech"), had violated the Kentucky Corrupt Practices Act by making a public statement in violation of KRS 121.055. See S.A., 11. This was denied in Petitioner's Answer, and Federal constitutional issues were raised. J.A., 12.

Petitioner's and Creech's statement of August 15, 1979, made during a local press conference, criticized the substantial increase in the cost of operating the Jefferson County Commissioners' Office during Respondent's term of office. Petitioner and Creech noted that the Respondent had increased the County Commissioners' pay to $20,000 per year, and had created a position of Executive Assistant to all County Commissioners' at a cost of $34,000 per year. In criticizing this public expenditure, Creech stated:

> "We abhor the commissioners' outrageous salaries. And to prove the strength of our convictions one of our first official acts as county commissioners will be to lower our salary to a more realistic level. We will lower our salaries, saving the tax payers $36,000 during our first term of office, by $3,000 each per year." J.A., 2.

Petitioner affirmed the statement of Creech and also articulated a second proposal to cut the salaries of the County Commissioners' office staff:

> "These two proposals—cutting our own salaries and reorganizing the commissioners' office staff, will save the taxpayers over $172,000 during our term of office. We make these statements fully aware that the office that we intend to occupy should set the tone for the type of public officials we intend to be. Under our guidance, extravagance of public expense will be a thing of the past, and responsibility and integrity will be our watch words, Progress through Cooperation our theme." J.A., 3.

Four days later, on August 19, 1979, these statements were fully retracted by Petitioner and Creech at a joint press conference. In retraction Petitioner and Creech jointly stated:

> "Last week, we pledged to reduce the Commissioners' salaries because we are committed to responsible government spending, and because we abhor the greed displayed by Hartlage's doubling of his own salary soon after taking office. And now, to our surprise and dismay, we find that, at least in some instances, attempts at good government may not be legal. We are men enough to admit when we have made a mistake. We have discovered that there are Kentucky Court decisions and Attorney General Opinions which indicate that our pledge to reduce our salaries if elected may be illegal. . . .
>
> However, being law abiding citizens and being pledged to enforcing all laws, we do hereby for-

mally rescind our pledge to reduce the County Commissioners' salary if elected and instead pledge to seek corrective legislation in the next session of the General Assembly to correct this silly provision of state law." J.A., 4-5.

On November 6, 1979, the election for the Jefferson County Commissioners' office was held and Petitioner defeated Respondent as noted, by 10,151 votes. (J.A., 7). Creech, who had made the same statements as Petitioner, *was defeated.*

• Proceedings in the Trial Court

On December 4, 1979, Respondent filed a Petition to void the election of the Petitioner based solely on the statement of August 15, 1979. J.A., 9. The Answer of Petitioner denied all of the substantive allegations as to the effect of Petitioner's statement being a violation of KRS 121.055 and raised constitutional defenses of free speech pursuant to the First and Fourteenth Amendments to the Constitution of the United States. J.A., 12.

This action was tried before the Jefferson Circuit Court, without a jury, on January 29 and 30 of 1980. The trial court found, inter alia, that after the retraction of August 19, 1979, until the election on November 6, 1979 Petitioner never again stated that he would reduce his salary as a Jefferson County Commissioner. The trial court noted that during the remainder of the campaign, Respondent directly questioned Petitioner as to the salarly reduction statements and Petitioner repeated his retraction of August 19, 1979. J.A., 18.

The trial court upon reviewing the whole record, found that based upon:

> ". . . (1) the almost immediate retraction by Brown; (2) no subsequent retreat by Brown from the retraction; (3) balancing the violation against the disenfranchisement of thousands of votes; (4) the presumption of the will of the people on the election process; and (5) the defeat of Dr. Creech, Brown's running mate, who had made the same statements in the same county wide election; . . . Brown was fairly elected." J.A., 25.

The trial court in reliance upon *Sparks* v. *Boggs*, Ky., 339 S. W. 2d 480 (1960), did find a violation of KRS 121.055 and held that Petitioner's statement was an unlawful promise to the electorate; but, despite the rationale of *Sparks*, as noted above, it held that Petitioner was fairly elected. Court costs were assessed against Petitioner. The Circuit Court also found that Respondent had himself violated at least one provision of the Kentucky Corrupt Practices Act, but held this violation de minimus. J.A., 18.

• Opinion and Judgment of the Court of Appeals of Kentucky

Respondent appealed to the Court of Appeals which reversed the Circuit Court, holding that the election should be voided pursuant to KRS 121.055 as interpreted by *Sparks, supra.* The Court of Appeals dismissed Petitioner's cross-appeal predicated on the violation of the Kentucky Corrupt Practices Act by Respondent due to Petitioner's failure to post a super-

sedeas bond to cover the costs assessed against him below. This Judgment and Opinion by the Court of Appeals was issued on August 8, 1980, J.A., 29.

• Opinion of the Court of Appeals of Kentucky on Petition for Rehearing

On October 29, 1980, the Court of Appeals of Kentucky denied Petitioner's Petition for Rehearing.

In this opinion the Court of Appeals questioned its own decision as to whether or not KRS 121.055 as interpreted by the holding in *Sparks, supra,* was unconstitutionally broad:

> "What appellee really argues is that the holding of *Sparks* v. *Boggs, supra,* is unconstitutionally broad for the reason that a holding in 1980 that a promise to serve in office at reduced pay can be equated with vote buying is an unconstitutional limitation on the freedom of speech. If carried to its logical extreme, he contends, any promise by a candidate to increase the efficiency and thus lower the cost of government might likewise be considered as an attempt to buy votes. This contention is not without logic or appeal, but since it strikes at the heart of *Sparks* v. *Boggs, supra,* it must be addressed to a Court which has the power to overturn or modify that decision." J.A., 39-40.

Having been denied his Petition for Rehearing, the Petitioner then moved to the next forum, the Supreme Court of Kentucky.

• Further Proceedings

On November 18, 1980, Petitioner filed a Motion for Discretionary Review of the Court of Appeals deci-

sion with the Kentucky Supreme Court. On December 9, 1980, the Kentucky Supreme Court denied this Motion. J.A., 41.

On December 10, 1980, the Court of Appeals, pursuant to Petitioner's request, granted a one week stay of its mandate voiding the Petitioner's election, J.A., 42, and on December 16, 1980 granted an additional Stay until March 9, 1981, so that Petitioner could seek relief from this Court. On December 16, 1980, the Court of Appeals granted Petitioner's Motion for Substitution of Counsel. J.A., 44.

On February 13, 1981, Petitioner filed an Application for Stay with this Court, requesting a Stay of the Court of Appeals mandate until such time as this Court denied Petitioner's Writ of Certiorari or until such time as the mandate of this Court shall issue. On February 18, 1981, Associate Justice Potter Stewart entered the requested Stay Order. J.A., 45.

On March 30, 1981, Petitioner received notice that the Petition for Writ of Certiorari had been granted by this Court.

V. SUMMARY OF ARGUMENT

I.

The Court of Appeals of Kentucky in its decision totally ignored this Court's prior decisions regarding the protection afforded political expression under the First Amendment. Beyond doubt, Petitioner's statement to serve for less than permitted, which was found

to be violative of KRS 121.055, is political expression. This Court in *Mills* v. *Alabama,* 384 U. S. 214 (1966); *Buckley* v. *Valeo,* 424 U. S. 1 (1976); *First National Bank of Boston* v. *Bellotti,* 435 U. S. 765 (1978); and *Monitor Patriot Co.* v. *Roy,* 401 U. S. 265 (1971) has held that one of the major purposes of the First Amendment right of free speech is to afford the free discussion of political and governmental affairs. This of course includes the manner in which government is operated. Certainly the statement of Petitioner to lower his salary if elected is a direct comment on governmental affairs and thus is protected speech.

II.

Petitioner's election was voided by the Kentucky Courts for alleged violation of KRS 121.055 which in pertinent part states:

> "No candidate . . . shall promise . . . things of value . . . to any person . . . in consideration of a person's vote." S.A., 11.

The Court of Appeals relied heavily upon *Sparks, supra,* in making its determination that Petitioner's statement that he would serve for less than permitted was a violation of KRS 121.055. Petitioner asserts that KRS 121.055 warns of nothing. There is no self-contained means in the statute by which a reader of common intelligence could judge its impact.

The only statute dealing with the payment to be received by County Commissioners as a fixed mandatory sum, is KRS 64.530. S.A., 3. This statute

requires a mandatory fixed compensation rate of $9,600 per year. Therefore a statement to serve for $3,000 less than the $20,000 sum currently being paid to County Commissioners would by common sense not be a salary lower than statutorily mandated. This Court, in civil and criminal matters, has consistently held that a statute which mandates or prohibits action in terms so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application" violates the essentials of due process. *Connally* v. *General Constr. Co.,* 269 U. S. 385, 391 (1926). This Court has also ruled that this danger of vagueness is magnified when its impact is upon political speech. *Cramp* v. *Board of Public Instruction,* 368 U. S. 278 (1961) and *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967). KRS 121.055 as interpreted by the Court of Appeals pursuant to the *Sparks* rationale must be determined to be constitutionally infirm under the doctrine of vagueness.

III.

This Court has upheld challenges to state statutes regulating the First Amendment right of free speech where the state statute goes beyond the necessary governmental purpose to control or prevent activities which may not be subject to state regulation. See *Gooding* v. *Wilson,* 405 U. S. 518 (1972). In these cases, this Court holds that a state may not regulate in the First Amendment area with such an unnecessarily broad sweep as to invade the area of freedom protected

by it. *Keyishian* v. *Board of Regents of New York, supra.*

In reviewing state court decisions dealing with overbroad regulation, this Court has traditionally mandated that the state appellate court be allowed to interpret state statutes prior to this Court's intervention. See *United States* v. *Thirty-Seven Photographs,* 402 U. S. 363 (1971). In the matter at bar, the Court of Appeals *has* interpreted KRS 121.055. Its interpretation directly infringes upon the fundamental First Amendment rights of the Petitioner. The statement to serve for less than permitted has now been interpreted by the Court of Appeals as an offer to reduce taxes pro tanto. This falls squarely within protected First Amendment speech. Accordingly, the Court of Appeals interprets this statute in an overbroad manner infringing upon the right of free unencumbered political speech as exercised by Petitioner in that it cannot be reasonably held that a state's interest in protecting the electorate from bribes, is served by a statute which makes it illegal to promise to reduce taxes.

IV.

Assuming, arguendo, that Petitioner's statement was unlawful at the time it was made on August 15, 1979, the Court of Appeals has still erred by disregarding this Court's teachings as to the balancing of such protected political speech against the compelling state interest. This test is commonly known as the Clear and Present Danger Test. The test has been used in

numerous instances to protect First Amendment rights. *Thornhill* v. *Alabama,* 310 U. S. 88 (1940), *Monitor Patriot Co.* v. *Roy, supra, Communist Party of Indiana* v. *Whitcomb,* 414 U. S. 441 (1974), *Edwards* v. *South Carolina,* 372 U. S. 229 (1963). In practical application the Court mandates that the state court discern whether actual facts exist which present a clear and present danger to the state's compelling interest. *Landmark Communications, Inc.* v. *Virginia,* 435 U. S. 829 (1978). Here, Petitioner's alleged illegal statement was made on August 15, 1979 and a retraction made on August 19, 1979, 78 days prior to the election of November 6, 1979. The election resulted in a plurality of 10,151 votes for the Petitioner and a defeat for his running mate, Creech, who had made the same statements. The trial court agreed with Petitioner's view and declared although a violation of the statute had occurred Petitioner was validly elected. The trial court's finding of fact and conclusions of law show that there was no clear and present danger to the state's compelling interest of protecting the election process. The Court of Appeals in reversing the trial court's holding refused to consider the retraction or defeat of Creech as evidence by assuming that KRS 121.055 required a strict mandatory construction. This reasoning is in total contravention of this Court's mandate regarding the clear and present danger test and is error.

V.

KRS 121.055 literally read prohibits any candidate from making any promise, either directly or indirectly,

in consideration for the vote of the general populous. The Court of Appeals interpreted Petitioner's statement to reduce his salary to less than permitted, as an offer to the general populous to reduce taxes pro tanto. Presumably, such an interpretation would prevent any promise by any candidate, to curtail government spending or seek other economies in government.

Kentucky is no different than the remaining states of the Union; its political process is viable and active. They involve contests in which normal political promises are made to the electorate in consideration for their votes. Here the Court of Appeals now holds that a promise to serve for less than is permitted is unacceptable whereas promises to provide for increased services, encourage business, or good administrative services are acceptable. By its decision in this matter, Kentucky has now established two standards of political speech based upon the content of the campaign promise.

This Court has condemned this type of artificial distinction as to legality of political speech based upon subject matter. *Police Department of Chicago* v. *Mosely,* 408 U. S. 92 (1972), *Fowler* v. *Rhode Island,* 345 U. S. 67 (1953) and *Niemotko* v. *Maryland,* 340 U. S. 268 (1951).

Implicit in the interpretation of KRS 121.055 by the Court of Appeals is that only candidates may not make promises to the electorate. There is no prohibition against citizens, citizens groups, or other organizations who may or may not advocate the same ideas as candidates. Thus, while a candidate in Kentucky may

not be privileged to address the ideas advocated by any of the citizens groups under KRS 121.055, non-candidates who are not bound by the statutory language of KRS 121.055 may address the same ideas with impunity. This is a distinction based upon the status of the speaker. This Court in *First National Bank of Boston* v. *Bellotti, supra,* held this type of distinction unconstitutional. Proscription, either by statute or court interpretation, which infringes upon the First Amendment right of free political speech based upon the speaker is constitutionally infirm. Here the Court of Appeals by its interpretation has made such a distinction.

VI. ARGUMENT

I. The Decision Below by The Court of Appeals of Kentucky Interpreting KRS 121.055 Is Not In Accord With Previous First Amendment Decisions of This Court.

A. Political Speech Is a Fundamental First Amendment Right.

This Court has held on numerous occasions, that the very core of the First Amendment right of freedom of speech, is intended to protect political expression addressing governmental affairs.

> "Whatever difference may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such mat-

> ters relating to political processes." *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966).

See also *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978), and *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265 (1971).

Here, Petitioner's statement to serve for less than permitted was made as political commentary upon the incumbent Respondent's voting in favor of an ordinance wherein the salary of the Respondent in his capacity as County Commissioner was substantially increased. The clear impact of the statement was to contrast one candidate's view of the manner in which government officials should be paid with the view of his opposition. These comparisons are clearly within the ambit of appropriate discussion by candidates and public revelation of their concepts as to the way government is operated or should be operated.

In *Buckley* v. *Valeo*, 424 U. S. 1 (1976) this Court observed:

> "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of this system of government established by our Constitution." p. 14.

It cannot be gainsayed that this constitutional guarantee has its fullest and most urgent application upon a campaign for political office such as that in which Petitioner was engaged. Thus, having established that Petitioner's statements are entitled to First Amendment protection, we must now examine the posture taken by the Court of Appeals to determine if there was a denial of such protection.

* * * * * * *

The Court of Appeals in its decision did not heed the constitutional argument based upon the First Amendment espoused by Petitioner. The Court in its decision (J.A., 29) totally ignored this Court's recent decisions upon the subject although in its opinion rendered upon the Petition for Rehearing it may have desired to change its ruling, it nonetheless felt bound by the prior precedent of *Sparks* v. *Boggs, supra.* In this opinion, the Court of Appeals although not changing its former ruling, did thoughtfully reflect that the Petitioner's arguments under the First Amendment were not without "logic and appeal." However, neither the Court of Appeals nor the Supreme Court of Kentucky has seen fit to unchain Petitioner's First Amendment right from the *Sparks* interpretation given KRS 121.055.

• • • • • • • •

This Court has carved out five (5) basic areas in which litigants may defend their First Amendment rights: (1) vagueness, *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967); (2) overbreadth, *Gooding* v. *Wilson,* 405 U. S. 518 (1972); (3) failure by statutes and interpretations of statutes to substantiate a compelling state interest in accord with the "clear and present danger standard," *Landmark Communications, Inc.* v. *Virginia,* 435 U. S. 829 (1978); (4) statutes and interpretations of statutes creating unallowable distinctions between forms of political expression based upon the content of speech, *Police Department of Chicago* v. *Mosely,* 408 U. S. 92 (1972); and (5) unal-

lowable distinctions between forms of political expression based upon the speaker, *First National Bank of Boston* v. *Bellotti, supra.* The present case contains all five unallowable infringements upon Petitioner's First Amendment right to conduct a viable campaign.

II. The Court of Appeals of Kentucky's Interpretation and Application of KRS 121.055 Is Void Based Upon Constitutional Grounds of Vagueness.

A. This Court's Pronouncements Upon the Vagueness Doctrine

This Court has consistently stated in both civil and criminal matters, that a statute which mandates or prohibits action in terms so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application" violates the essentials of due process. *Connally* v. *General Constr. Co.,* 269 U. S. 385, 391 (1926).

This Court has especially warned of the danger of vagueness when its impact is upon political speech entitled to First Amendment protection. In *Cramp* v. *Board of Public Instruction,* 368 U. S. 278 (1961) it is taught:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit punishment for the fair use of this

> opportunity is repugnant to the guarantee of liberty contained in the Fourteenth Amendment." (pp. 287, 288).

In practical application, this Court requires that state courts be given an opportunity to interpret their own statutes prior to its accepting an attack upon grounds of constitutional vagueness. Here, the Court of Appeals has interpreted KRS 121.055, but the interpretation only increases the uncertainty surrounding the statute. This Court holds that where a state statute, as interpreted by the state court, creates the chilling effect of threatened sanctions upon the exercise of such First Amendment right the standards of permissible statutory vagueness are to be strictly applied. In short, precision of regulation giving notice to the speaker, who wishes to exercise the right is the touchstone. Without such notice the threat of such sanctions deter the exercise of vital First Amendment rights. *Keyishian* v. *Board of Regents of New York,* 385 U. S. 589 (1967); *Baggett* v. *Bullitt,* 377 U. S. 360 (1964); and *Ashton* v. *Kentucky,* 384 U. S. 195 (1966).

B. The Court of Appeals of Kentucky's Interpretation of KRS 121.055 is Impermissibly Vague.

In the matter at Bar the Court of Appeals voided the election of Petitioner based upon an alleged violation of KRS 121.055. The Kentucky Court relied upon *Sparks* v. *Boggs, supra.* In *Sparks,* it was held that a promise, by a candidate for the office of City Commissioner whose salary was fixed by statute violated the

Kentucky Corrupt Practices Act, KRS 123.040.[2] In likening *Sparks* to the matter at bar, the Court of Appeals held that Petitioner's salary was fixed by law, and therefore he could not legally reduce his salary. Accordingly, his statement to do so was an unlawful promise to the taxpayers to "reduce pro tanto the amount of taxes each taxpayer must pay." J.A., at p. 33. In reaching this decision, we assume the Kentucky Court must have parsed the statute to read:

> "No candidate . . . shall promise . . . things of value . . . to any person . . . in consideration of a person's vote."

We submit that the language of the statute warns of nothing. There is no self contained means in the statute by which the Petitioner could judge its impact. It leaves a candidate, such as Petitioner, in a position to either act at risk, or not act at all and be deprived of constitutional rights. This is the type of vagueness that this Court has struck down on previous occasions. *See Ashton* v. *Kentucky, supra* and *Baggett* v. *Bullitt, supra.*

The Court of Appeals did not address the issue of statutory clarity in its opinion. Instead it relied upon the precedent of *Sparks, supra,* as giving notice to the Petitioner that this form of political expression has been held to be a violation of a statute similar to KRS 121.055, despite the fact that *Sparks* was decided fourteen years prior to the adoption of the current statute

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[2]KRS 123.040 is now repealed. Its successor statute was held to be KRS 121.055.

and was factually different from the matter at hand. In *Sparks,* the offending office seekers offered to serve for $1 per year. The remaining part of their salary was offered to select groups in the community rather than to apply the savings to the general fund for the benefit of all tax payers, as was done by Petitioner.

Sparks is equally inapplicable in that under the then controlling salary limitation statute, each commissioner was to receive an annual salary of *not more than $500.* Obviously, the offending parties in *Sparks* were on notice of the fact that to serve for $1 per year was less than the $500 statutory sum. In the matter at hand, the Petitioner stated that he would serve for $3,000.00 less than the permitted $20,000 salary. In effect, the Petitioner stated that he would serve for $17,000 per year rather than $20,000. The Court of Appeals ignored KRS 64.530(6) which is the only statute explicity controlling the salary a County Commissioner may receive. KRS 64.530(6) provides that compensation of County Commissioners serving on fiscal courts in counties containing a city of the first class[3] shall not exceed $9,600 per year. Obviously, the Petitioner's statement to serve for $17,000 per year is not a statement that he would serve for less than the statutory figure of $9,600 per year. Yet the Court of Appeals assumed that the official salary was $20,000. Such analysis takes into effect what is commonly referred to in the Commonwealth of Kentucky as the "rubber dollar" theory. Pursuant to KRS 64.528, the

[3]The situs of the City of Louisville is Jefferson County. Louisville is a city of the first class.

fiscal court of any county in the Commonwealth *may* elect, in accord with the present value and purchasing power of the dollar, to adjust certain official's compensation and thus adjust present salaries for inflationary erosion. The mechanics for such adjustment, in so far as here relevant, is an administrative determination and advice to the appropriate governing body which *may* then set the annual compensation of elected officials such as county commissioners. The difference between $9,600 as statutorily required by KRS 64.528 and the $20,000 sum which the office of County Commissioner was receiving at the time of Petitioner's statement is, in effect, inflated dollars. Petitioner's statement merely reflected that he would serve for 3,000 deflated dollars less than was permited; but, unlike the facts in *Sparks,* Petitioner made no reference to a willingness to serve for less than the statutory sum of $9,600.

Clearly, even if the Petitioner was aware of the *Sparks* rationale, he would only be apprised of the fact that it would not be permissible to offer to serve for less than the $9,600 provided by KRS 64.530(6). Thus neither *Sparks* nor KRS 121.055 would caution the Petitioner of a possible violation of law. Surely, he could have felt secure in the knowledge that he did not promise to serve for less than the $9,600 statutory sum. Common intelligence would dictate that there was no correlation between the unlawful conduct complained of in *Sparks,* and the alleged unlawful conduct of the Petitioner.

Certainly, as this Court noted in *Keyishian* v. *Board of Regents of New York, supra,* at p. 604, the danger of the chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform what is being proscribed. Here, the interpretation by the Court of Appeals gives no indication to Petitioner that his campaign statement was unlawful. It must follow then, that this statute as interpreted by the Court of Appeals is impermissibly vague.

III. The Kentucky Court's Interpretation and Application of KRS 121.055 Is Violative of Constitutional Principles of Overbreadth.

A. This Court's Prior Precedent Regarding Overbreadth and the First Amendment.

As a general principle of constitutional interpretation where "legislation is unconstitutionally broad as to be susceptible of application to conduct that is protected by the First Amendment", such legislation may be successfully attacked. See *Gooding* v. *Wilson,* 405 U. S. 518 (1972); *Plummer* v. *Columbus,* 414 U. S. 2 (1973); *NAACP* v. *Button,* 371 U. S. 415 (1963). This Court teaches that a statute regulating speech must be carefully drawn or authoritatively construed to reach only unprotected speech and not be susceptible of application to protected expression. Standing to allege overbreadth does not depend upon the infringement of Petitioner's First Amendment rights but the objectionable quality is found in the potential application of the statute to other protected areas of free speech.

See *Keyishian* v. *Board of Regents, supra,* and *NAACP* v. *Button, supra.*

The present controversy involves violation of First Amendment rights to carry on a political campaign. It affects both the rights of the Petitioner and other candidates in the Commonwealth of Kentucky who must now refrain from engaging in active political discussion due to the overbroad interpretation and the hazard of loss created by the Court of Appeals by its interpretation of KRS 121.055.

B. The Court of Appeals of Kentucky Has Interpreted KRS 121.055 in a Manner Which Is Impermissibly Overbroad.

The Court of Appeals of Kentucky has held that the statement of Petitioner to serve for less than permitted was in effect an offer to reduce taxes pro tanto. Clearly, a campaign promise to reduce taxes is the exact form of candidate promise which the First Amendment protects. *Mills* v. *Alabama, supra.* Although we do not take issue with the right of the Commonwealth of Kentucky to protect the electoral process from corruption, it is contended that a public statement to reduce one's salary and thus reduce taxes pro tanto is not inimical to the electoral process. To the contrary, it is illustrative of the type of good wrought by open competition for public office and is a protected right. Yet, the Court of Appeals has gone beyond what is required to protect the electoral process from corrupt practices and entered the area protected by the First Amendment. It has in effect ruled that KRS 121.055 can be used to prevent a candidate from discussing one of the real issues

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of government — the salary received by the candidate, if elected.

Perhaps more important is that this decision by the Court of Appeals will effect candidates running for office in the Commonwealth of Kentucky *far* into the future. It may well be rhetorical to ask: If the Court of Appeals can void Petitioner's election for discussing in public forum the salary to be accepted by the candidate if elected, then what matters are left open for such discussion? If salary discussions are to be regarded as unlawful, then is it not equally likely that a promise to bring more jobs, or a promise to better the plight of the elderly, or any dedication expressed by a candidate toward betterment of the common good are also violations?

We submit that the distinction drawn by the Court of Appeals by this interpretation of KRS 121.055 infringes directly upon allowable political speech and creates an unacceptable chilling effect upon the First Amendment rights of candidates for political office. Clearly, under the Court's prior precedent the doctrine of overbreadth is applicable, and the judgment of the Court of Appeals is erroneous.

IV. The Court of Appeals of Kentucky Has Not Applied the Clear and Present Danger Test Mandated by This Court.

A. In Areas of Restraint on Political Speech, This Court Mandates a Balancing of Compelling State Interest Against the Clear and Present Danger to Such Interest.

This Court has often spoken on matters dealing with the advocacy of potentially unlawful activity by means

of speech and conduct. The Court has held on numerous occasions that more than mere advocacy of potentially unlawful conduct is required before a state court may restrain fundamental First Amendment rights. The threshold for such restraint upon First Amendment rights is a Clear and Present Danger to a compelling state interest.

The Court requires that the state make an affirmative showing that there is a clear and present danger to the state's compelling interest in the area which the state seeks to regulate. This formula for the protection of delicate interests has been applied in such cases as labor organization efforts, *Thornhill* v. *Alabama,* 310 U. S. 88 (1940) and *Thomas* v. *Collins,* 323 U. S. 516 (1945); in cases where individuals have advocated the violent overthrow of the government, *Herndon* v. *Lowry,* 301 U. S. 242 (1937) and *Communist Party of Indiana* v. *Whitcomb,* 414 U. S. 441 (1974); and, in various civil rights demonstrations, *Edwards* v. *South Carolina,* 372 U. S. 229 (1963) and *Wood* v. *Georgia,* 370 U. S. 375 (1962). The expressions in each of these matters were uttered by litigants and were, in effect, political commentary of the day not unlike the utterances of the Petitioner here.

In practical application, a state court is required to inquire whether actual facts exist which present a clear and present danger to the state interest alleged. A court may not accept at face a legislative "finding" such as is contained in the statute at bar, and impose what in essence is "strict liability" for speech protected

by the First Amendment. The state court is required to find from the facts adduced that the speech sought to be proscribed presents an imminent danger to the state's compelling interest.

In *Landmark Communications, Inc.* v. *Virginia,* 435 U. S. 829 (1978) this Court enunciates the judicial function and delineates that function from the legislative function thusly:

> "A legislature appropriately inquires into and may declare the reasons in compelling legislative actions but the judicial function commands analysis of whether the specific conduct charged revolves within the reach of the statute and if so whether the legislation is consistent with the constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." p. 844.

As this case aptly illustrates, this Court requires that a state court not impose *ipse dixit* liability upon speech which may advocate potential unlawful action. See also *Bridges* v. *California,* 314 U. S. 252 (1941) and *Whitney* v. *California,* 274 U. S. 357 (1927). In the matter at bar Kentucky ignores the balancing of rights; instead it imposes a vicarious sanction without more.

B. The Petitioner's Retraction of His Statement Some 78 Days Prior to the Election, and the Defeat of His Running Mate, Creech, Show That There Was No Clear and Present Danger to the Integrity of the Electoral Process.

On August 15, 1979, the Petitioner made his alleged unlawful statement. On August 19, 1979 through the

same forum Petitioner retracted his statement. This was some 78 days prior to the election. In the election the Petitioner defeated the Respondent by a plurality of 10,151 votes. Creech, Petitioner's running mate who had made the same statement, was defeated.

At both the trial of this action and upon appeal, the Petitioner argued that even if his statement was technically illegal under KRS 121.055, it was retracted within such time as to have no effect on the election process. The Court of Appeals refused to even consider this evidence:

> "The other considerations of the trial court likewise have no applicability. As previously discussed in this opinion, retraction of the illegal statement, and no retreat from the retraction, is of no consequence under the law of the state; likewise there is no authority to disregard a mandatory statute because of balancing the violation against disenfranchisement, presumption of will of the people and defeat of Brown's running mate who made the same statements. Neither can we agree that Brown was fairly elected in face of his violation of the Corrupt Practices Act." (J.A., 35).

This finding by the Court of Appeals is exactly the kind of judicial abdication this Court has found unacceptable in previous clear and present danger standard decisions.

In contrast the Finding of Facts by the Jefferson Circuit Court clearly show that no clear and present danger to the electoral process existed. The trial court found:

"Further, upon reviewing the whole record, considering the following: (1) the almost immediate retraction by Brown; (2) no subsequent retreat by Brown from the retraction; (3) balancing the violation against disenfranchisement of thousands of votes; (4) the presumption of the will of the people on the election process; and (5) the defeat of Dr. Creech, Brown's running mate, who had made the same statements in the same county wide election; the court adjudges . . . , that Brown was fairly elected." (J.A., at p. 25).

The Court of Appeals ignored these findings of fact and applied its mandatory, strict liability standard. Beyond cavil, the clearly established precedent enunciated by this Court has been disregarded. Accordingly, the judgment of the Court of Appeals is in error.

V. The Kentucky Court of Appeals has Interpreted KRS 121.055 in a Manner Not Consistent With This Court's Prior Decisions Regarding Artificial Distinctions of Legality for Different Forms of Political Speech Based Upon Speech Content.

A. This Court's Prior Decisions

This Court has often warned against statutes which factually or by interpretation create an artificial distinction of legality based upon the subject matter of the speech to be regulated. The case of *Police Department of the City of Chicago* v. *Mosely*, 408 U. S. 92, 96 (1972), is most apt. There the City of Chicago by ordinance attempted to restrict picketing in front of schools for any purpose other than labor disputes. In rejecting the ordinance as unconstitutional, under the

equal protection clause of the First and Fourteenth Amendments, this Court held:

> "Necessarily, then, under the equal protection clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored and more controversial view. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status' in the field of ideas, and government must afford all point of view an equal opportunity to be heard." p. 96.

See also *Niemotko* v. *Maryland,* 340 U. S. 268 (1951); *Fowler* v. *Rhode Island,* 345 U. S. 67 (1953); and *Carey* v. *Brown,* —— U. S. ——, 65 L. Ed. 2d 263, —— S. Ct. —— (1980). In application to the present controversy, the Court of Appeals has created an artificial distinction between various political campaign promises. It has again ignored the carefully defined precedents of this Court which prohibit such *artificial* distinctions.

B. The Court of Appeals of Kentucky Has Interpreted KRS 121.055 to Allow Some Forms of Expression of Political Speech But Not Others.

The Court of Appeals has interpreted Petitioner's Statements to serve for less than is permitted, as essentially an offer to reduce the taxes of the populous pro tanto. (J.A., 29). The logical extension of such reasoning is that any promise by a candidate to the

general electorate is a violation of KRS 121.055. The restrictiveness of this ruling is self evident. Presumably, this interpretation of KRS 121.055 would prevent any promise by any candidate not only to reduce taxes, but even such promises which relate to reducing waste in government or like economies all of which have the potential effect of reduction of taxes for citizens of the state. Indeed, a literal interpretation of the statute such as has been used by the Court of Appeals requires that no candidate for political office in the Commonwealth of Kentucky make any promise whatsoever as to any political change his election to public office may bring the electorate.

Kentucky is not unlike its sister states. Fiercely contested elections are the rule, not the exception. Normal political promises by candidates are made. The Court of Appeals has not voided the elections of other candidates based upon campaign promises to the electorate to produce greater efficiencies in government. These promises too, may effect the taxes payable by the citizens of the Commonwealth. However, the Court of Appeals has now stated that this form of political promise — a promise to serve for less than is permitted — is an unacceptable promise. However, general promises to provide good administrative service, to encourage business to locate in the Commonwealth of Kentucky, to provide new jobs and other political promises of common betterment are presumably acceptable. In practical application, by this ruling, the Court of Appeals has established two standards of political speech regarding campaign promises based purely upon

content. This is an unacceptable distinction based upon this Court's prior decisions.

VI. The Court of Appeals' Interpretation of KRS 121.055 Creates an Artificial Distinction as to the Legality of Different Forms of Political Speech Based Upon the Speaker.

A. This Court's Prior Decisions Regarding Distinctions Based on the Speaker.

This Court has recently addressed the issue of whether or not a state statute as interpreted by a state court may prohibit certain forms of political speech based upon the identity of the speaker. In the case of *First National Bank of Boston* v. *Bellotti, supra,* and again in the case of *Consolidated Edison* v. *Public Service Commission,* —— U. S. ——, 65 L. Ed. 2d 319, —— S. Ct. —— (1980) this Court has recognized this unallowable distinction by state courts. In *First National Bank of Boston* v. *Bellotti, supra,* the court addressed the issue of whether or not a state statute which prohibited expenditures by banks for purposes of influencing the vote on a referendum was constitutional. In holding that such a statute infringed upon First Amendment rights based upon the speaker, the Court announced:

> "If the speakers were not corporations, no one would suggest that the state court silence their proposed speech. It is the type of speech indispensible to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of speech in terms of its capacity for

> informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Id.* at 777.

This principal was reiterated in *Consolidated Edison, supra,* where once again a state's efforts to prevent a public utility corporation from exercising its First Amendment rights was disallowed.

B. The Court of Appeals of Kentucky Has Interpreted KRS 121.055 to Restrict Expression of Political Speech Based upon the Speaker.

The Court of Appeals in its interpretation of KRS 121.055, has impliedly stated that *only candidates may not make promises to the electorate* in consideration for their votes. This is the literal requirement of KRS 121.055 as interpreted. There is no statutory prohibition contained in KRS 121.055 directed to citizens groups, or others who are not candidates who may advocate the same concept as Petitioner. In interpreting Petitioner's statement as an offer to reduce taxes pro tanto, the Court of Appeals impliedly states that a candidate may not offer to reduce taxes, whereas citizens and citizens groups not laboring under such ban may do so . . . thus a distinction based upon the status of the speaker.

Indeed, this is the type of artificial distinction based upon the speaker which this Court has itself prohibited. Although it is conceded the state has a substantial interest in protecting the electorate, the proselytization by various special interest groups for a reduction of taxes, can be of no less danger than the statement of a

Candidate who offers to serve for less than the allowed sum and its illusory effect upon the same electorate's tax rates. Clearly, the Court of Appeals would not deign to forbid all political discussion in this area. However, in accordance with decisions of this Court, if a subject is a valid subject for discussion by one then it must be a valid subject for discussion by all. The holding of the Court of Appeals is thus a distinction as to the source of the political statement, and is an inappropriate circumscription of fundamental First Amendment rights.

VII. CONCLUSION

For each and all of the foregoing reasons the judgment of the Court of Appeals of Kentucky should be reversed, and the mandate of this Court should issue directing that Petitioner's election is valid.

Respectfully submitted,

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STATUTORY APPENDIX

§ 1257. State Courts; Appeal; Certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

* * * * * * * *

64.527. Annual computation of consumer price index for determination of rate of adjustment of compensation of elected county officials.—In order to equate the compensation of county judges/executive, county clerks, sheriffs, justices of the peace, county commissioners, coroners and jailers with the purchasing power to the dollar, the executive department for finance and administration shall compute by the second Friday in February of every year the annual increase or decrease in the consumer price index of the preceding year by using 1949 as the base year in accordance with section 246 of the Constitution of Kentucky which provides that the above elected officials shall be

paid at a rate no greater than seven thousand two hundred dollars ($7,200) per annum. The executive department for finance and administration shall notify the appropriate governing bodies charged by law to fix the compensation of the above elected officials of the annual rate of compensation to which the elected officials are entitled pursuant to the increase or decrease in the consumer price index. Upon notification from the executive department for finance and administration, the appropriate governing body may set the annual compensation of the above elected officials at a rate no greater than that stipulated by the executive department for finance and administration. (Enact. Acts 1974, ch. 254, § 1; 1976, ch. 283, § 1; 1976 (Ex. Sess.), ch. 14, § 38; 1976 (Ex. Sess.), ch. 20, § 6, effective January 2, 1978; 1976 (Ex. Sess.), ch. 17, § 19, effective January 1, 1978; 1978 ch. 384, § 582, effective June 17, 1978.)

* * * * * * * *

64.528. Compensation of specified officials adjusted to current purchasing power of the dollar.—In order to equate the current rate of compensation of commonwealth's attorneys, county clerks, county judges/executive, county attorneys, sheriffs, jailers, justices of the peace, and commissioners with the present value and purchasing power of the dollar, the court required by law to fix the compensation of the officials named in this section may, on or before September 1, 1974, adjust said officials' compensation within the limits set forth in Acts 1974, chapter 254 and may provide that said officials be entitled to the maximum amount of compensation for the entire 1974 calendar year. (Enact. Acts 1974, ch. 254, § 7; 1976 (Ex. Sess.), ch. 14, § 39; 1976 (Ex. Sess.), ch. 20, § 6, effective January 2, 1976; 1978, ch. 384, § 130, effective June 17, 1978.)

* * * * * * * *

64.530. Compensation of county officers and employes, and members of fiscal court.—(1) Except as provided in subsections (5) and (6) of this section, the fiscal court of each county shall fix the compensation of every county officer and employe except the officers named in KRS 64.-535 and the county attorney. The fiscal court may provide a salary for the county attorney.

(2) For the purposes of this section, justices of the peace and constables in all counties shall be deemed to be county officers and deputies or assistants of county officers shall be deemed to be county employes, but employes of county boards or commissions which are now authorized by law to fix the compensation of their employes shall not be deemed to be county employes for the purposes of this section.

(3) In the case of officers compensated from fees, or partly from fees and partly by salary, the fiscal court shall fix the maximum compensation that any officer except the officers named in KRS 64.535 may receive from both sources. The fiscal court may also fix the number of deputies and assistants, and, the compensation thereof, and the maximum amount that the officer may expend each year for expenses of his office.

(4) In the case of county officers elected by popular vote and the county attorney, in the event the fiscal court provides him a salary, the monthly compensation of the officer and of his deputies and assistants shall be fixed by the fiscal court not later than the first Monday in May in the year in which the officers are elected, and the compensation of the officer shall not be changed during the term but the compensation of his deputies or assistants may be reviewed and adjusted by the fiscal court not later than the first Monday in May of any successive year upon the written request of the officer. On or before August 1, 1966,

the fiscal court shall fix the salary provided herein for the county attorneys for the term commencing in January, 1966, notwithstanding any other provisions of this section which may be inconsistent herewith.

(5) Nothing in this section shall apply to property valuation administrators or their deputies, assistants and expenses, in any county, or to the circuit court clerk, county clerk, sheriff, jailer, and their deputies, assistants and expenses, in counties having a population of seventy-five thousand (75,000) or more.

(6) Justices of the peace serving on a fiscal court in any county, and county commissioners serving on a fiscal court in any county other than one (1) containing a city of the first, second, third or fourth class, shall be paid for their services, out of the county treasury, not to exceed the maximum compensation allowable under KRS 64.527. The fiscal court shall fix the amount to be received within the above limit, but no change of compensation shall be effective as to any member of a fiscal court during his term of office. The compensation of county commissioners serving on fiscal courts in counties containing a city of the first class shall not exceed nine thousand six hundred dollars ($9,600) per year, in counties containing cities of the second class it shall not exceed nine thousand dollars ($9,000) per year and in counties containing cities of the third or fourth class it shall not exceed twenty percent (20%) more than the annual compensation paid in the county for the calendar year immediately preceding 1974, and all of said annual salaries shall be payable monthly. Justices of the peace and county commissioners shall not receive any compensation for their services on the fiscal court, other than as provided by this section; nor shall they receive any compensation for serving on committees of the fiscal court. The fiscal court shall fix the amount to be received within the above limit, but no change of compen-

sation except as provided in KRS 64.285 shall be effective as to any member of a fiscal court during his term of office. (Enact. Acts 1950, ch. 123, § 9; 1956, ch. 144; 1958, ch. 126, § 2; 1962, ch. 214, § 1; 1964, ch. 109, § 3; 1966, ch. 15, § 2; 1966, ch. 255, § 75; 1968, ch. 152, § 33; 1970, ch. 203, § 1; 1972, ch. 30, § 1; 1972, ch. 203, § 5; 1972, ch. 358, § 1; 1974, ch. 60, § 2; 1974, ch. 254, § 4; 1976, ch. 306, § 1; 1976 (Ex. Sess.), ch. 17, § 20, effective January 1, 1978; 1976 (Ex. Sess.), ch. 14, § 40, effective January 2, 1978; 1978, ch. 196, § 1, effective June 17, 1978; 1978, ch. 384, § 131, effective June 17, 1978.)

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FISCAL COURTS

67.040. Fiscal Court—Members—Presiding Officer—Deadlock.—(1) The fiscal court of each county shall consist of the county judge/executive and the justices of the peace of the county; or of the county judge/executive and three (3) county commissioners elected under KRS 67.050 and 67.060.

(2) The county judge/executive shall preside, if present. A majority of the justices of the peace or commissioners shall elect one (1) of their number to preside during the absence or inability of the county judge/executive to preside. If any person fails to comply with a lawful order of the fiscal court, the circuit court, on application of the county judge/executive, may compel obedience by proceedings for contempt.

(3) When there is a tie vote in the fiscal court in the selection of any officer or employee to be selected by the fiscal court, and a deadlock results and continues for fifteen (15) days or longer, the county judge/executive shall cause to be entered upon the minutes of the fiscal court an order reciting the facts as to the deadlock, and the question upon which it has occurred and exists, and thereupon, the county judge/executive shall make such appointment. (1833, 1836, 1837: amend. Acts. 1942, ch. 173 §§ 1, 2; 1952, ch. 224, § 1; 1976 (Ex. Sess.), ch. 20, § 6, effective January 2, 1978; 1978, ch. 118, § 7, effective June 17, 1978; 1978, ch. 384, § 141, effective June 17, 1978.)

67.083. Additional Powers of Fiscal Courts.—(1) It is the purpose of this section to provide counties as units of general purpose local government with the necessary latitude and flexibility to provide and finance various governmental services within those functional areas specified in subsection (3) of this section, while the general assembly retains full authority to prescribe and limit by statute local governmental activities when it deems such action necessary.

(2) The fiscal court of any county is hereby authorized to levy all taxes not in conflict with the Constitution and statutes of this state now or hereafter enacted.

(3) The fiscal court shall have the power to carry out governmental functions necessary for the operation of the county. Except as otherwise provided by statute or the Kentucky Constitution, the fiscal court of any county may enact ordinances, issue regulations, levy taxes, issue bonds, appropriate funds and employ personnel in performance of the following public functions:

(a) Control of animals, and abatement of public nuisances;

(b) Regulation of public gatherings;

(c) Public sanitation and vector control;

(d) Provision of hospitals, ambulance service, programs for the health and welfare of the aging and juveniles, and other public health facilities and services;

(e) Provision of corrections facilities and services, and programs for the confinement, care and rehabilitation of juvenile law offenders;

(f) Provision of parks, nature preserves, swimming pools, recreation areas, libraries, museums and other recreational and cultural facilities and programs;

(g) Provision of cemeteries and memorials;

(h) Conservation, preservation and enhancement of natural resources including soils, water, air, vegetation and wildlife;

(i) Control of floods;

(j) Causing the repair or demolition of structures which present a hazard to public health, safety or morals or are otherwise inimical to the welfare of residents of the county; causing the redevelopment of housing and related commercial, industrial and service facilities in urban or rural areas; providing education and counseling services and technical assistance to present and future residents of publicly assisted housing;

(k) Planning, zoning and subdivision control according to the provisions of KRS Chapter 100;

(l) Adoption, by reference or in full, of technical codes governing new construction, renovation or maintenance of structures intended for human occupancy;

(m) Regulation of commerce for the protection and convenience of the public;

(n) Regulation of the sale of alcoholic beverages according to the provisions of KRS Chapters 241 through 244;

(o) Exclusive management of solid wastes by ordinance or contract or by both and disposition of abandoned vehicles;

(p) Provision of public buildings, including armories, necessary for the effective delivery of public services;

(q) Cooperation with other units of government and private agencies for the provision of public services, including but not limited to training, educational services and cooperative extension service programs;

(r) Provision of water and sewage and garbage disposal service but not gas or electricity; including management of onsite sewage disposal systems;

(s) Licensing or franchising of cable television;

(t) Provision of streets and roads, bridges, tunnels and related facilities, elimination of grade crossing, provision of parking facilities, enforcement of traffic and parking regulations;

(u) Provision of police and fire protection;

(v) Regulation of taxis, buses and other passenger vehicles for hire;

(w) Provision and operation of air, rail and bus terminals, port facilities, and public transportation systems;

(x) Promotion of economic development of the county, directly or in cooperation with public or private agencies, including the provision of access roads, land and buildings, and promotion of tourism and conventions;

(y) Preservation of historic structures.

(4) The county judge/executive is hereby authorized and empowered to exercise all of the executive powers pursuant to this section.

(5) A county acting under authority of this section may assume, own, possess and control assets, rights and liabilities related to the functions and services of the county.

(6) If a county is authorized to regulate an area which the state also regulates, the county government may regulate the area only by enacting ordinances which are consistent with state law or administrative regulation.

(a) If the state statute or administrative regulation prescribes a single standard of conduct, a county ordinance is consistent if it is identical to the state statute or administrative regulation.

(b) If the state statute or administrative regulation prescribes a minimal standard of conduct, a county ordinance is consistent if it establishes a standard which is the same as or more stringent than the state standard.

(c) A county government may adopt ordinances which incorporate by reference state statutes and administrative regulations in areas in which a county government is authorized to act.

(7) County ordinances which prescribe penalties for their violation shall be enforced throughout the entire area of the county unless:

(a) Otherwise provided by statute, or

(b) The legislative body of any city within the county has adopted an ordinance pertaining to the same subject matter which is the same as or more stringent than the standards that are set forth in the county ordinance. The fiscal court shall forward a copy of each ordinance which is to be enforced throughout the entire area of the county to the mayor or chairman of the board of trustees of each city in the county.

(8) The powers granted to counties by this section shall be in addition to all other powers granted to counties by other provisions of law. A permissive procedure authorized by this section shall not be deemed to be exclusive or to prohibit the exercise of other existing laws and laws which may hereafter be enacted but shall be an alternative or supplement thereto.

(9) Any agency of county government exercising authority pursuant to subsection (3) (y) of this section shall, prior to exercising such authority, obtain the voluntary written consent of the owner of the structure. Consent may be obtained only after advising the owner in writing of any advantages and disadvantages to the owner which are likely to result from the exercise of such authority. (Enact. Acts 1972, ch. 384, § 1; 1976 (Ex. Sess.), ch. 20, § 6, effective January 1, 1978; 1978. ch. 118, § 3, effective June 17, 1978; 1979 (Ex. Sess.), ch. 22, § 1, effective May 12 1979; 1980, ch. 149, § 3, effective July 15, 1980.)

121.055. Candidates prohibited from making expenditure, loan, promise agreement or contract as to action when elected, in consideration for vote.—No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contract with any person to vote for or support any particular individual, thing or measure, in consideration for the vote or the financial or moral support of that person in any election, primary or nominating convention, and no person shall require that any candidate make such a promise, agreement or contract. (Enact. Acts 1974, ch. 130, § 182; 1980, ch. 292, §3, effective July 15, 1980.)

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No. 80-1285

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CARL W. BROWN - - - - - Petitioner

versus

EARL J. HARTLAGE - - - - Respondent

On Writ of Certiorari to the Supreme Court of the United States

AMICUS CURIAE'S BRIEF ON THE MERITS

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PETITION FOR CERTIORARI FILED JANUARY 26, 1981.
CERTIORARI GRANTED MARCH 30, 1981.

QUESTION PRESENTED

Is the interest of the Commonwealth of Kentucky in the integrity of its electoral process such a compelling state interest as to warrant incidental restraint on Petitioner's speech?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1285

CARL W. BROWN - - - - - *Petitioner*

v.

EARL J. HARTLAGE - - - - *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

AMICUS CURIAE'S BRIEF ON THE MERITS

The name of all the parties to this proceeding are stated in the caption of this case as given above.

I. OPINIONS AND JUDGMENTS BELOW

The Amicus Curiae adopts the Joint Appendix of this case and Petitioner's statements of the nonreported matters as follows:

The Order Denying Petitioner's Motion for Discretionary Review before the Supreme Court of Kentucky is not reported, J.A. 41, December 9, 1980.

Earlier opinions in the suit are also not reported, and are as follows:

Findings of Fact, Conclusions of Law and Opinion, Jefferson Circuit Court, Jefferson County, Kentucky, on the merits, J.A. 18, February 6, 1980.

Judgment of the Jefferson Circuit Court, Jefferson County, Kentucky, J.A. 27, February 12, 1980.

Final Judgment and Opinion of the Court of Appeals of Kentucky, J.A. 29, August 8, 1980.

Opinion and Order Denying Petition for Rehearing Court of Appeals of Kentucky, Commonwealth of Kentucky, J.A. 38, October 29, 1980.

Proceedings in the case subsequent to the Order Denying Petitioner's Motion for Discretionary Review also not reported were as follows:

Orders entering a Stay of Court of Appeals of Kentucky Mandate, Court of Appeals of Kentucky, Commonwealth of Kentucky, J.A. 42-43, December 10, 1980 and December 16, 1980.

Order for Substitution of Counsel, Court of Appeals of Kentucky, Commonwealth of Kentucky, J.A. 44, December 16, 1980.

The Amicus Curiae was appointed by the Court's Order of October 19, 1981, which appears in the Appendix to this brief.

II. JURISDICTION

The Amicus Curiae adopts the statement of jurisdiction as stated by the Petitioner as follows:

The Order denying Petitioner's Motion for Discretionary Review in the Supreme Court of Kentucky

was entered December 9, 1980, and the Petition for Certiorari was filed in this Court on January 26, 1980 within the time allowed by the United States Code, Title 28, Section 2101(c). The judgment of the Court of Appeals of Kentucky, of which review and reversal is here sought is a final judgment within the meaning of the jurisdictional statute, 28 U.S.C., Section 1257(3).

III. CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

Amicus Curiae asserts the statutes of the Commonwealth of Kentucky, as construed, in controversy are a valid exercise of the Commonwealth's protection of its compelling state interest in the integrity of the electoral process and are not a violation of the Petitioner's rights under the First and Fourteenth Amendments to the Constitution of the United States. In developing the Amicus Curiae's argument, he will rely on the statutes which appear in the Appendix hereto, as being reasonable, validly construed, not vague nor overbroad and not inhibiting. The statutes in the Appendix are made a part of this brief.

IV. STATEMENT OF THE CASE

The case at Bar results from an election contest initiated by the Respondent against the Petitioner. The Respondent and Petitioner were candidates for election to the office of Commissioner of the Jefferson County, Kentucky, Fiscal Court. This is the legislative body of the county government in Jefferson County,

Kentucky. As required by the statute in question, the Respondent filed an action against the Petitioner in the Jefferson Circuit Court. The suit, which appears at Joint Appendix Page 9, alleged the Petitioner violated the Kentucky Corrupt Practices Act by making a statement in violation of KRS 121.055 (See Appendix hereto). The Petitioner denied the violation but admitted the statement.

The Petitioner's statement of August 15, 1979, which appears at Joint Appendix Page 1, offered, inter alia, to serve for a salary less than the statutorily mandated salary of $20,000 for a Commissioner of the Jefferson Fiscal Court. The statement also contained other criticisms of government spending. The criticisms of government spending and other matters were not contested, it being obvious they were not violations of the statute, KRS 121.055.

On August 19, 1979, the Petitioner admitted the illegality of his August 15, 1979 offer to serve for less than the statutorily mandated salary. The August 19, 1979 statement appears in the Joint Appendix at Page 4 and 5.

The Petitioner defeated the Respondent in the general election on November 6, 1979.

Proceedings in Trial Court

On December 4, 1979, Respondent, pursuant to KRS 120.015 filed an action in the Jefferson Circuit Court alleging a violation of KRS 121.055.

The case was tried on January 29 and 30, 1980. The trial court found a violation of KRS 121.055 and held the Petitioner's statement an unlawful promise to the electorate. The trial court, however, relying on other items did not void the election. The court costs were assessed against the Petitioner.

Opinion and Judgment of the Court of Appeals of Kentucky

Respondent filed an appeal with the Court of Appeals which reversed the Circuit Court's not voiding the election. The Court of Appeals dismissed the Petitioner's appeal for failure to post a supersedeas bond, and in the judgment and opinion of the Court of Appeals, the election was voided. The judgment and opinion of the Court of Appeals may be found in Joint Appendix Page 29.

Opinion of the Court of Appeals of Kentucky on Petition for Rehearing

The Court of Appeals denied Petitioner's Petition for Rehearing on October 29, 1980. This denial appears in Joint Appendix Page 38.

Further Proceedings

The Kentucky Supreme Court on December 9, 1980 denied the Petitioner's Motion for Discretionary Review. This Order appears in the Joint Appendix Page 41.

Subsequent to the Kentucky Supreme Court's denial of discretionary review, the Petitioner, on December 10, 1980, was granted a stay of the Court of Appeals

voiding of the election and on December 16, 1980 was granted an additional stay until March 9, 1981 to permit the Petitioner to appeal to the Supreme Court of the United States. The stay of December 10, 1980 is found at the Joint Appendix Page 42. On December 16, 1980 the Court of Appeals allowed substitution of counsel. The Order appears at Joint Appendix Page 44.

The Petitioner subsequently filed an application with the United States Supreme Court requesting a stay of the Court of Appeals' voiding of the election. The Court, through Associate Justice Potter Stewart granted the stay on February 18, 1981 and said Stay Order appears in the Joint Appendix at Page 45.

A Certiorari was granted by this Court on March 30, 1981.

Subsequently, the Amicus Curiae was appointed by the Court on October 19, 1981.

V. SUMMARY OF ARGUMENT

The Court of Appeals of Kentucky followed a long line of well reasoned, logical opinions of Kentucky's highest courts which found a promise to serve at a reduced salary to be a violation of KRS 121.055. Nothing in the Court's Opinion violated any provision of the Constitution of the United States of America nor did violence or variance to any of this Court's prior decisions. This Court has held consistently that the rights under the First and Fourteenth Amendment are not absolute but may be subject to reasonable, ra-

tional restraint if an equally compelling right is involved. Nothing in the procedures or proceedings of the case to this stage has violated any right under the First or Fourteenth Amendment of the Constitution of the United States of America to question government, its operation or any other exercise of the First Amendment Right other than to assert the paramount interest of the Commonwealth of Kentucky in protecting the integrity of the electoral process.

In the argument of the Amicus Curiae no unreasonable or prior restraint is sought on any right of the Petitioner. In fact, the rights of free swinging debate are encouraged. The argument, however, does develop the state's paramount interest in protecting its electoral process and relies upon the historical, even-handed and logical application of the statute KRS 121.055. The statement is made that in order to balance the two sacred rights of free speech and the state protecting its compelling interest, the state must prevail unless it unreasonably, unseasonably and unjustifiably intrudes on the Petitioner's right of free speech.

The Amicus Curiae admits to the Court that this is a regrettable case, as any case involving the electoral process. In the course of the argument, however, the Amicus Curiae traces the history of the statute, its development and particularly the minimum restraint on the free speech of the Petitioner and the minimum nature of the penalty. This is a noncriminal statute and at worse, the Petitioner would be called upon to again submit himself to the voters, without the promise of legally impermissible and impossible acts,

for the electorate's verdict. The integrity of the electoral process, the noncriminal nature of the statute, and the balancing of the two important rights involved will be the basis of the Amicus Curiae's argument for sustaining the lower court.

The Amicus Curiae submits to the Court and will argue, that this statute is neither vague nor overbroad. It has been clearly interpreted for over fifty (50) years and the interpretation of the statute has removed any question of vagueness or overbreadth. There are limitations on acts which can be described in a statute. In the case at Bar there is no problem of vagueness or overbreadth and the Amicus Curiae will so argue.

VI. ARGUMENT

The compelling state interest of the Commonwealth of Kentucky; History and interpretation of KRS 121.055; The test of the state's compelling interest; First Amendment rights of Petitioner; Conclusion.

The Compelling State Interest of the Commonwealth of Kentucky

The Commonwealth of Kentucky has a compelling interest in the integrity of the electoral process and the statute, KRS 121.055, is a valid protection of said interest, and has been interpreted in a manner consistent with *Buckley* v. *Valeo,* 424 U. S. 1 (1976).

It cannot be doubted, disputed or debated that the protection of the integrity of the electoral process and the assurance of effective and meaningful suffrage is

a right and responsibility of the state well recognized by this Court. *Cousins* v. *Wigoda,* 419 U. S. 477 (1975); *Yick* v. *Hopkins,* 118 U. S. 356 (1886); *Reynolds* v. *Simms,* 377 U. S. 533 (1964); *Williams* v. *Rhodes,* 393 U. S. 23 (1968); *Kramer* v. *Union School District,* 395 U. S. 621 (1969); *Dunn* v. *Blumstein,* 405 U. S. 330 (1972); *Mills* v. *Alabama,* 384 U. S. 214 (1966).

This type interest, vis a vis the First Amendment, has been described, as compelling (*NAACP* v. *Button,* 371 U. S. 415 (1963); *Sherbert* v. *Verner,* 374 U. S. 398 (1963)); substantial (*NAACP* v. *Button,* 371 U. S. 415 (1963); *NAACP* v. *Alabama,* 357 U. S. 449 (1958)); subordinating (*Bates* v. *Little Rock,* 361 U. S. 516 (1960)); paramount (*Thomas* v. *Collins,* 323 U. S. 516 (1945); *Sherbert* v. *Verner,* 374 U. S. 398 (1963)); cogent (*Bates* v. *Little Rock,* 361 U. S. 516 (1960)); strong (*Sherbert* v. *Verner,* 374 U. S. 398 (1963)); weighty (*Grayned* v. *City of Rockford,* 408 U. S. 104 (1972)).

The characterization and parameters of the interest which must appear, to justify regulations have been well defined and stated in *United States* v. *O'Brien,* 391 U. S. 367 (1968) where the Court held as follows:

> "Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental

restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

History and Interpretation of KRS 121.055

The Legislature of the Commonwealth of Kentucky, acting pursuant to a mandated provision of the Constitution of the Commonwealth of Kentucky (Sections 150-151) enacted the current statute, and predecessor statutes, pursuant to the mandate.

Several things are to be noted about this statute, (1) it applies to *all* candidates including the members of the legislature who enacted it, and was not enacted for any nefarious, unworthy, untenable or other unacceptable or unapprovable reasons. (2) This was not a statute that applied one standard to one group of candidates and another to other sets of candidates. (3) The statute contains elements of non-speech conduct as well as conduct relating to speech. (4) The statute has been thoroughly construed, and such construction now becomes a part of the statute, in such a way remove any hint of vagueness or overbreadth and meet the test(s) as follows: *Broderick* v. *Oklahoma,* 413 U. S. 601 (1973), *O'Brien* v. *United States,* 391 U. S. 367 (1968), *United States Civil Service Commission* v. *National Association of Letter Carriers,* 413 U. S. 548 (1973), *Grayned* v. *City of Rockford,* 408 U. S. 104 (1972) and *Arnett* v. *Kennedy,* 416 U. S. 134 (1974).

The statute was first interpreted in the case of *Owsley* v. *Hill,* 275 S. W. 797 (1925). This was the

first authoritative interpretation of the predecessor statute to the present one since its enactment. Any tinge of overbreadth or vagueness was removed in this case and, in addition, any significant limitation on a candidate's right to free speech was erased forever. The Kentucky Court set the standard by which the statute would become triggered. That standard, which remains the law to this hour, is that a candidate's right to free speech is not at all limited if the *act* which he or she promises or advocates is one which is *permitted* by the Constitution and/or Statutes of the Commonwealth of Kentucky. In the *Owsley* v. *Hill* case the appeal was dismissed on the obvious grounds that the promise which the candidate made, exercising his rights under the First and Fourteenth Amendments, was fully capable of being performed since the salary had not yet been set, the Court saying

> "The contestee here did not propose to perform the duties of his office at a rate less than that fixed by law, but simply proposed to fix that salary at a time when it came to be fixed at a rate less than that which had prevailed during the preceding term."

This remained the constant in *Dietz, et al.* v. *Zimmer,* 21 S. W. 2d 999, the Court voiding an election wherein the candidates had promised, if elected, to elect a city manager, the city manager's salary to be paid from the successful condidate's (by then office holder) salary. The Court, in voiding the election, said

> "The promise in the present instance was not only to spend money for a purpose not authorized

> by law (hiring a city manager) but it also involved the discharge of official duties for less than the salaries *fixed therefor*" (emphasis added).

This was, and remains, not permissible under interpretations of the highest Court of Kentucky as it relates to the conduct of campaigns in the Commonwealth.

Subsequent to the *Owsley* and *Zimmer* cases the highest court decided the case of *Sparks* v. *Boggs*, 339 S. W. 2d 480 (1960). In this case the Court found the candidate guilty of violating the statute, and stated

> "The material difference between the case of *Owsley* v. *Hill* and the one at Bar is that the annual salary of a Commissioner for Hazard had already been fixed by law for the new term, whereas such had not been done in respect to the county attorney's office in controversy in *Owsley* v. *Hill*."

In the *Sparks* case the salary had already been fixed and it was on this basis the Court held the statute to have been violated since the candidate promised an act forbidden by the law of the Commonwealth of Kentucky and in addition, would be violative of the Constitution of the Commonwealth of Kentucky (Sections 161 and 235) since the salary could not be changed during the term for which the candidate was elected. It was a legal and constitutional impossibility for the candidate to deliver what he had promised in the *Sparks* case since the salary had already been set, but it was not a statutory or constitutional impossibility to do so in the *Owsley* case. This is the important

area of concern for the application of the statute. It further narrowed and clarified the statute. The Court of Kentucky in interpreting this statute has clearly and unequivocally established that candidates are free to say anything not otherwise proscribed by the First Amendment in an election campaign and that the line is crossed *only* if the act promised is a legal impossibility under the statutes or Constitution of Kentucky. This is a valid distinction.

The doctrine was affirmed in *Draughn* v. *Martin,* 350 S. W. 2d 161 (1961), wherein a candidate for tax commissioner promised not to tax certain taxable property. The Court in the decision pointed out that all property was subject to taxation except that exempted by Section 170 of the Constitution of the Commonwealth of Kentucky and that the promise was thus a nullity. It compared this promise to its long established rule of offering to serve for less than the reduced pay, which had already been condemned, and that the offer of tax leniency offers to reduce pro tanto the taxes which the citizens of the county would pay and thus was an offer of something of value.

The Court's attention is called to the Kentucky Court's observation in this case that the fact of there not being much taxable property for which the leniency was promised by the candidate in the county in which he was seeking election was of no avail since the promise itself was the gravaman of the offense and not the dollars and cents available as a result of the promise. The promise could not be carried out be-

cause of the statute, as interpreted, and the Constitution of the Commonwealth of Kentucky.

The interpretations of the statute by the Courts of the Commonwealth of Kentucky show, without dispute, that the First Amendment Rights of any candidate are not limited except when the candidate promises something which as a *matter of law* could not be delivered.

Another cogent observation of the operation and interpretation of the statute appeared in the *Sparks* case wherein the Court ruled that the acts of the Court in an election contest for the violation of the statute was in the "nature of an inquiry into the purity of an election." This points out the overwhelming state interest which is at stake. To make this act as odious as possible the enabling statute, KRS 120.155, requires the losing candidate to bring the action and does not permit a taxpayer or other type derivative action. This sets the stage: The acts proscribed in the statute may only be challenged by a losing candidate which, at best, is suspicious and not a case upon which courts look with favor, the loser suing the winner. However, the Court in the *Sparks* case indicating it as an inquiry into the purity of the election, asserts the state's interest in this compelling and subordinating state interest. The statute does not do more than require the rerunning of the election. It is not a penal statute, the loser is not declared the winner, and the winner even if his or her election is voided is permitted to run again and seek the office. So, the purity of the state's paramount and compelling interest is put into effect only if a losing candidate

can convince a court that the winning candidate demonstrably violated the statute by promising something prohibited by law. The statute therefore is not state action initiated to intrude on the electoral process.

Candidates for office in Kentucky are permitted, and usually do, make extravagant promises and offer fantastic schemes for election. By the narrowing of the interpretive effect of the statute the highest court of the state has limited this extravagance merely to the point of forbidding matters which, as a matter of law, are not deliverable. It further softens the impact by allowing the voided candidate to rerun if desirous.

It cannot be disputed that in the present case the salary for the office which the Petitioner sought had already been set pursuant to KRS 64.530 when he made his offer to serve at a reduced salary. From the line of cases cited above this was a promise of an act which could not, under Kentucky law, be delivered. The trial court, with due observation to the rights of all parties, found the Petitioner had violated the statute. With commendable motives the trial court, even though the Petitioner had admitted the statement, did not void the election because of the five reasons given in the joint appendix at Page 25. It is not the purpose of this brief to say more about the five items listed by the trial court than to say as equitable as the trial judge hoped to be, the five grounds given were not, and are not, defenses to the violation of the statute, KRS 120.015. On review the Court of Appeals of Kentucky (Joint Appendix, Page 29) rejected the

Trial Court's rationale. It is important to note the statement contained several promises, none of which were attacked, nor indeed could be attacked, except the salary reduction promise which, for the reasons stated above, was an act impossible of performing under Kentucky Law. The statement referred to as a "retraction" (Joint Appendix, Page 4) was not in fact a retraction but basically a restatement of the original impermissible statement. Not one word has been raised however in objection to the promise of reducing government spending generally.

The Test of the State's Compelling Interest

There was no attempt to control speech but rather to protect, from an evil shown to be great, some interest clearly within the sphere of governmental concern.

> "The purpose was to achieve an objective other than restraint on speech. Only the *method* of achieving this end touched on protected rights and that only tangetially." (Emphasis added.) *Speiser* v. *Randall,* 357 U. S. 513 (1958).

The evil at which Congress had attempted to strike in that case was thought sufficiently grave to justify limited enfringement on protected rights.

It has further been held and established as a reasonable test.

> "There are governmental interests sufficiently important to outweigh the possibility of enfringement, particularly when the 'free functioning of our national institutions is involved.'" *Communist Party of the United States* v. *Subversive Activities Control Board,* 6 L. Ed. 2d 625 (1961).

"Significant interference with protected rights of political association may be sustained *if* the state demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of *associational* freedoms." *Cousins* v. *Wigoda,* 419 U. S. 417.

"Principal has been developed that restriction on the electoral process must survive exacting scrutiny. The restriction can be sustained only if it furthers a 'vital' governmental interest." *American Party of Texas* v. *White,* 39 L. Ed. 2d 744.

It is submitted KRS 121.055 meets the tests asserted and is a valid and permissible exercise of vital, fundamental authority.

First Amendment Rights of Petitioner

There can be no doubt, and none is asserted, that the First Amendment guarantees of the Constitution of the United States of America, as applied by the Fourteenth Amendment to the Constitution, assure the securing of freedom of speech "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *California,* 354 U. S. 476 (1957). Further, "the maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the republic, is a fundamental principal of our constitutional system." *Stromberg* v. *California,* 283 U. S. 359.

The "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *New York Times* v. *Sullivan,* 376 U. S. 254 (1964). This right needs "breathing space." *NAACP* v. *Button,* 371 U. S. 415 (1963). One of the signal manifestations of the Constitution is its insistence and encouragement of free swinging discussions, uninhibited and not chilled, of public questions. No right is more precious. This Court, in a long line of decisions, has recognized, enforced, and protected this valuable right. The protection thus afforded and the veneration accorded this doctrine is cemented in the law of this land. The Court has, however, as a rational and integral part of the doctrine found it to be not absolute. The recognition of this lack of the absolute nature of this right has not been one to diminish it, but on the contrary one to define it. To adopt an absolutist point of view could lead to anarchy. To dilute the underpinning of this valued right could lead to a police state. Thus, the approach taken throughout the history of the Court has not been to *dilute* the right, but to establish sensible, logical and rational basis for its *application* by balancing the rights involved. The Court has taken the view that some things are not within the protected right when viewed from the perspective of judicial determination and public policy as reflected by statutes protecting compelling state interests.

The Court has taken the logical position that not all expression is protected (*Chaplinski* v. *New Hamp-*

shire, 315 U. S. 568), the same case holding the Constitutional guarantees of freedom of speech forbid the states from punishing the use of words or language not within "narrowly limited cases of speech." In *Spieser* v. *Randall,* 357 U. S. 513 this Court amplified the doctrine by stating, "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed or punished is firmly drawn." In directing Congress and Legislatures in the drafting of legislation to meet the *Spieser* test, the Court in *Gooding* v. *Wilson,* 405 U. S. 518 (1972), once again to gain the full perspective, held "the statute must be carefully drawn or be *authoritatively construed* to punish only unprotected speech and not be susceptible of application to protected expression."

KRS 121.055 has been authoritatively construed and the line *clearly drawn.*

This Court, as a further assistance in drafting legislation which might be found to have an "incidental" limitation on a protected right, has given direction in *O'Brien* v. *United States,* 391 U. S. 367 (1968) stating four elements must be present when the incidental limitation (not the dilution) of the First Amendment freedom is permitted must occur. They are:

1. It must be within the Constitutional power of the government, in this case the legislature of the Commonwealth of Kentucky. That the regulation of election conduct is within the Constitutional power of the legislature of the Commonwealth of Kentucky cannot be disputed.

2. It must further an important or substantial or governmental interest. This iikewise cannot be disputed.

3. The governmental interest must be unrelated to the suppression of free expression. By the authoritative interpretation of the statute in question, KRS 121.055, it cannot be disputed that the statute includes many non-speech elements and that the gravamen or the evil sought to be corrected is not merely directed to expression.

4. The incidental restriction on an alleged First Amendment right must be no greater than is essential to the furtherance of that interest. As the interpretations of the statute in question have shown consistently, the line now drawn is the narrowest of all lines possible and the restriction minimal.

> "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in pratcice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts may reasonably be conceived to justify it." *McGowan* v. *Maryland,* 6 L. Ed. 2d 393.

An erroneous statement and a pledge to do something demonstrably against the law are not on an equal footing and deception shouldn't be given the same standing as advocacy — this distinction doesn't reduce the "breathing space" free expression requires.

It is well within the state's authority and power to enact statutes which forbid the injection of matters, possibly corrupting in their tendencies, which divert the observation and evaluation of candidates on the basis of their merit and fitness for the job. The public policy inherent in the statute is vindicated by being assured candidates for office and office holders are not limited to those willing to serve for reduced pay because of their individual wealth, those who ascribe methods of obtaining income to other than the salary, and those who really have no desire to be of service but just want the job for the sake of the job. The state would go beyond the permissible boundary of authority if it dictated who could be candidates and under what circumstances the candidates might speak or limit the content of their speeches or forbid speech or matters not affecting the discharge of the office. *Bond* v. *Floyd,* 394 U. S. 705 (1969). The statute at bar does no violence to the concept.

VII. CONCLUSION

This case presents a clash between two precious, fundamental and well-defined concepts; the right of free speech by a candidate and the state's compelling interest and obligation to insure fair elections and meaningful suffrage. The problem confronting the court is to balance these rights.

The amicus curiae urges the Court to sustain the judgment of the Kentucky Court. There are numerous reasons for seeking this course.

The non-criminal statute, as interpreted by the courts of Kentucky furthers an important state obligation. The state has no right to dictate who may be candidates. It does have a right, even an obligation, to take reasonable steps to assure the *purity* of the electoral process. The legislature of Kentucky has provided for the protection of this interest by KRS 121.055. This statute as interpreted, draws with surgical precision the line beyond which candidates may not go. An examination of this statute shows several things:

It was not designed nor passed for an unreasonable, outrageous nor obnoxious reason, as some of the statutes this court has examined in the past. It was, and is, not a harassing nor frustrating statute. It leaves open, and properly, the full freedom of expression required under the First Amendment. It is not a statute directed at speech or expression. It is a statute to further the legitimate public obligation of the state to prevent acts which detract or retard the electoral process. It is not self-starting nor state enforced. It comes into action *only* when a candidate who loses sues the candidate who wins. If the losing candidate doesn't assert the corruption of the process, no one else, specifically the state, can. When the state acts, it is only in its role of arbiter. It finds no one guilty, assesses no fine, does not imprison or find one guilty of fraud. It does not replace the winner with the loser. It merely finds the well-defined line crossed and orders a new exercise of the electoral process by the electorate. It

does not forbid the same candidates running again. The line spoken of is simply the line between lawfully deliverable or permissible acts and those which *as a matter of law* cannot be produced. Not one case interpreting this statute has varied from this beacon. This places no impermissible burden on the candidate.

This history of this nation is regrettably replete with examples of attempted abusive and regressive state action, especially where basic human and constitutional rights have sought expression, whether in voting, demonstrating or otherwise seeking redress of wrong. This Court has correctly protected the rights of citizens, whether individual or in association, against unwarranted, unnecessary and unreasonable acts of government. The case at bar is not such a case. No candidate has a constitutional right to inject in the electoral process acts demonstratively impossible of legal achievement. To prohibit same is a valid exercise of state authority. This is precisely what the Kentucky Statute KRS 121.055 does, and should be permitted. Anytime any Legislative body acts someone is restrained or directed. It is only the unreasonable assertion of the state's power which is proscribed.

Even if the Court should find, in the case at bar, impermissible state restraint on the Frst Amendment rights of the Petitioner, the entire statute should not fall. The statute contains non-speech and speech elements. In reality the speech elements is not affected unless it intrudes on non-speech matter (performance of an act not lawfully possible). There are numerous and valid non-speech acts condemned by the statute.

They are measurable and identifiable and should, under no circumstances, be struck down. To do so would be to do violence to the entire electoral process in Kentucky, not justified by the controversy before the Court. The controversy before the Court is unfortunate. It can be corrected by the court sustaining the Kentucky Court's decision which would afford the electorate an opportunity to elect a candidate in an election free of impermissible acts. The statute in controversy involves at most, incidental restraint, not chilling, but on the contrary liberating and directional, drawing sensible, perceivable, reasonable parameters for proper conduct of the electoral process.

For the reasons cited herein the amicus curiae urges the Court to sustain the Court below.

Respectfully submitted,

L. Stanley Chauvin, Jr.
2720 Citizens Plaza
Louisville, Kentucky 40202
(502) 587-0553

Counsel for Amicus Curiae

APPENDIX

Office of the Clerk
SUPREME COURT OF THE UNITED STATES
Washington, D.C. 20543
October 19, 1981

L. Stanley Chauvin, Jr., Esq.
Carroll, Chauvin, Miller & Conliffe
27th Floor, Citizens Plaza
Louisville, Kentucky 40202

RE: Carl W. Brown
v. Earl J. Hartlage
No. 80-1285

Dear Mr. Chauvin:

The Court today entered the following order in the above-entitled case:

"L. Stanley Chauvin, Jr., Esquire of Louisville, Kentucky, a member of the Bar of this Court, is invited to brief and argue this case, as *amicus curiae*, in support of the judgment below."

Very truly yours,
Alexander L. Stevas, Clerk
/s/ By Francis J. Lorson
Chief Deputy Clerk

rwk
cc: Victor L. Baltzell, Jr., Esq.
Fred M. Goldberg, Esq.
Honorable Steven L. Beshear

64.527. Annual computation of consumer price index for determination of rate of adjustment of compensation of elected county officials.—In order to equate the compensation of county judges/executive, county clerks, sheriffs, justices of the peace, county commissioners, coroners and jailers with the purchasing power to the dollar, the executive department for finance and administration shall compute by the second Friday in February of every year the annual increase or decrease in the consumer price index of the preceding year by using 1949 as the base year in accordance with section 246 of the Constitution of Kentucky which provides that the above elected officials shall be paid at a rate no greater than seven thousand two hundred dollars ($7,200) per annum. The executive department for finance and administration shall notify the appropriate governing bodies charged by law to fix the compensation of the above elected officials of the annual rate of compensation to which the elected officials are entitled pursuant to the increase or decrease in the consumer price index. Upon notification from the executive department for finance and administration, the appropriate governing body may set the annual compensation of the above elected officials at a rate no greater than that stipulated by the executive department for finance and administration. (Enact. Acts 1974, ch. 254, § 1; 1976, ch. 283, § 1; 1976 (Ex. Sess.), ch. 14, § 38; 1976 (Ex. Sess.), ch. 20, § 6, effective January 2, 1978; 1976 (Ex. Sess.), ch. 17, § 19, effective January 1, 1978; 1978 ch. 384, § 582, effective June 17, 1978.)

* * * * * * * *

64.528. Compensation of specified officials adjusted to current purchasing power of the dollar.—In order to equate the current rate of compensation of commonwealth's attorneys, county clerks, county judges/executive, county attorneys, sheriffs, jailers, justices of the peace, and com-

missioners with the present value and purchasing power of the dollar, the court required by law to fix the compensation of the officials named in this section may, on or before September 1, 1974, adjust said officials' compensation within the limits set forth in Acts 1974, chapter 254 and may provide that said officials be entitled to the maximum amount of compensation for the entire 1974 calendar year. (Enact. Acts 1974, ch. 254, § 7; 1976 (Ex. Sess.), ch. 14, § 39; 1976 (Ex. Sess.), ch. 20, § 6, effective January 2, 1976; 1978, ch. 384, § 130, effective June 17, 1978.)

* * * * * * * *

64.530. Compensation of county officers and employes, and members of fiscal court.—(1) Except as provided in subsections (5) and (6) of this section, the fiscal court of each county shall fix the compensation of every county officer and employe except the officers named in KRS 64.-535 and the county attorney. The fiscal court may provide a salary for the county attorney.

(2) For the purposes of this section, justices of the peace and constables in all counties shall be deemed to be county officers and deputies or assistants of county officers shall be deemed to be county employes, but employes of county boards or commissions which are now authorized by law to fix the compensation of their employes shall not be deemed to be county employes for the purposes of this section.

(3) In the case of officers compensated from fees, or partly from fees and partly by salary, the fiscal court shall fix the maximum compensation that any officer except the officers named in KRS 64.535 may receive from both sources. The fiscal court may also fix the number of deputies and assistants, and, the compensation thereof, and the maximum amount that the officer may expend each year for expenses of his office.

(4) In the case of county officers elected by popular vote and the county attorney, in the event the fiscal court provides him a salary, the monthly compensation of the officer and of his deputies and assistants shall be fixed by the fiscal court not later than the first Monday in May in the year in which the officers are elected, and the compensation of the officer shall not be changed during the term but the compensation of his deputies or assistants may be reviewed and adjusted by the fiscal court not later than the first Monday in May of any successive year upon the written request of the officer. On or before August 1, 1966, the fiscal court shall fix the salary provided herein for the county attorneys for the term commencing in January, 1966, notwithstanding any other provisions of this section which may be inconsistent herewith.

(5) Nothing in this section shall apply to property valuation administrators or their deputies, assistants and expenses, in any county, or to the circuit court clerk, county clerk, sheriff, jailer, and their deputies, assistants and expenses, in counties having a population of seventy-five thousand (75,000) or more.

(6) Justices of the peace serving on a fiscal court in any county, and county commissioners serving on a fiscal court in any county other than one (1) containing a city of the first, second, third or fourth class, shall be paid for their services, out of the county treasury, not to exceed the maximum compensation allowable under KRS 64.527. The fiscal court shall fix the amount to be received within the above limit, but no change of compensation shall be effective as to any member of a fiscal court during his term of office. The compensation of county commissioners serving on fiscal courts in counties containing a city of the first class shall not exceed nine thousand six hundred dollars ($9,600) per year, in counties containing cities of the second class it shall not exceed nine thousand dollars

($9,000) per year and in counties containing cities of the third or fourth class it shall not exceed twenty percent (20%) more than the annual compensation paid in the county for the calendar year immediately preceding 1974, and all of said annual salaries shall be payable monthly. Justices of the peace and county commissioners shall not receive any compensation for their services on the fiscal court, other than as provided by this section; nor shall they receive any compensation for serving on committees of the fiscal court. The fiscal court shall fix the amount to be received within the above limit, but no change of compensation except as provided in KRS 64.285 shall be effective as to any member of a fiscal court during his term of office. (Enact. Acts 1950, ch. 123, § 9; 1956, ch. 144; 1958, ch. 126, § 2; 1962, ch. 214, § 1; 1964, ch. 109, § 3; 1966, ch. 15, § 2; 1966, ch. 255, § 75; 1968, ch. 152, § 33; 1970, ch. 203, § 1; 1972, ch. 30, § 1; 1972, ch. 203, § 5; 1972, ch. 358, § 1; 1974, ch. 60, § 2; 1974, ch. 254, § 4; 1976, ch. 306, § 1; 1976 (Ex. Sess.), ch. 17, § 20, effective January 1, 1978; 1976 (Ex. Sess.), ch. 14, § 40, effective January 2, 1978; 1978, ch. 196, § 1, effective June 17, 1978; 1978, ch. 384, § 131, effective June 17, 1978.)

* * * * * * * *

121.055. Candidates prohibited from making expenditure, loan, promise agreement or contract as to action when elected, in consideration for vote.—No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contract with any person to vote for or support any particular individual, thing or measure, in consideration for the vote

or the financial or moral support of that person in any election, primary or nominating convention, and no person shall require that any candidate make such a promise, agreement or contract. (Enact. Acts 1974, ch. 130, § 182; 1980, ch. 292, § 3, effective July 15, 1980.)

* * * * * * *

REGULAR ELECTIONS

120.155. Contest of regular election of officers other than governor, lieutenant governor, general assembly member and certain city officers.—Any candidate for election to any state, county, district or city office (except the office of governor, lieutenant governor, member of the general assembly, and those city offices as to which there are other provisions made by law for determining contest elections), for whom a number of votes was cast equal to not less than twenty-five per cent (25%) of the number of votes cast for the successful candidate for the office, may contest the election of the successful candidate, by filing a petition in the circuit court of the county where the contestee resides, unless the officer is one elected by the voters of the whole state, in which case the petition shall be filed in the Franklin Circuit Court. The petition shall be filed and process issued within thirty (30) days after the day of election; it shall state the grounds of the contest relied on, and no other grounds shall afterwards be relied upon. The contestee shall file an answer within twenty (20) days after the service of summons upon him. The answer may consist of a denial of the averments of the petition and may also set up grounds of contest against the contestant; if grounds are so set up they shall be specifically pointed out and none other shall thereafter be relied upon by the party. Any candidate who would have been qualified to bring a contest action under this section, who is a party to a recount proceeding under KRS 120.185, may, by filing answer in

the recount proceeding within the time allowed by this section for filing grounds of contest, set forth grounds of contest against the petitioner in the recount proceeding. A reply may be filed within ten (10) days after the answer is filed; its affirmative allegations shall be treated as controverted, and no subsequent pleading shall be allowed. (Enact. Acts 1974, ch. 130, § 163.)

* * * * * * * *

§ 150. Disqualification from office for using money or property to secure or influence election—Corporation not to use money or other thing of value to influence election—Exclusion from office for conviction of felony or high misdemeanor—Laws to regulate elections.—Every person shall be disqualified from holding any office of trust or profit for the term for which he shall have been elected who shall be convicted of having given, or consented to the giving, offer or promise of any money or other thing of value, to procure his election, or to influence the vote of any voter at such election; and if any corporation shall, directly or indirectly, offer, promise or give, or shall authorize, directly or indirectly, any person to offer, promise or give any money or anything of value to influence the result of any election in this State, or the vote of any voter authorized to vote therein, or who shall afterward reimburse or compensate, in any manner whatever, any person who shall have offered, promised or given any money or other thing of value to influence the result of any election or the vote of any such voter, such corporation, if organized under the laws of this Commonwealth, shall, on conviction thereof, forfeit its charter and all rights, privileges and immunities thereunder; and if chartered by another State and doing business in this State, whether by license, or upon mere sufferance, such corporation, upon conviction of either of the offenses aforesaid, shall forfeit all right to carry on

any business in this State; and it shall be the duty of the General Assembly to provide for the enforcement of the provisions of this section. All persons shall be excluded from office who have been, or shall hereafter be, convicted of a felony, or of such high misdemeanor as may be prescribed by law, but such disability may be removed by pardon of the Governor. The privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult or other improper practices.

* * * * * * * *

§ 151. Person guilty of fraud, intimidation, bribery or corrupt practice to be deprived of office by suitable statutory means.—The General Assembly shall provide suitable means for depriving of office any person who, to procure his nomination or election, has, in his canvass or election, been guilty of any unlawful use of money, or other thing of value, or has been guilty of fraud, intimation, bribery, or any other corrupt practice, and he shall be held responsible for acts done by others with his authority, or ratified by him.

Cited: Commonwealth v. Headley (1901), 111 Ky. 815, 23 K. L. R. 1104, 64 S. W. 744; Ridings v. Jones (1926), 213 Ky. 810, 281 S. W. 999; Hart v. Rose (1934), 255 Ky. 576, 75 S. W. (2d) 43; Commonwealth ex rel. Funk v. Huntsman (1951), 237 S. W. (2d) 876.

* * * * * * * *

§ 161. Compensation of city, county or municipal officer not to be changed after election or appointment or during term, nor term extended.—The compensation of any city, county, town or municipal officer shall not be changed after his election or appointment, or during his term of office; nor shall the term of any such officer be extended

beyond the period for which he may have been elected or appointed.

* * * * * * * *

§ 235. Salaries of public officers not to be changed during term—Deductions for neglect.—The salaries of public officers shall not be changed during the terms for which they were elected; but it shall be the duty of the General Assembly to regulate, by a general law, in what cases and what deductions shall be made for neglect of official duties. This section shall apply to members of the General Assembly also.

* * * * * * * *

AFFIDAVIT AND CERTIFICATE

Affiant states pursuant to Rules 28 and 35 of the Supreme Court of the United States of America, that on the 15th day of December, 1981, he deposited at the United States Post Office, Sixth and Broadway Streets, Louisville, Kentucky 40201, with first-class postage prepaid, copies of this brief as follows: Office of the Clerk, Supreme Court of the United States of America, Washington, D.C. 20543; Steven L. Beshear, Esq., Attorney General, Commonwealth of Kentucky, Frankfort, Ky. 40601; Fred M. Goldberg, Esq., Jonathan Goldberg, Esq., Goldberg & Simpson, PSC, 2800 First National Tower, Louisville, Ky. 40202; Office of Clerk, Supreme Court of Kentucky, State Capitol Building, Frankfort, Kentucky 40601; Office of Clerk, Court of Appeals of Kentucky, Bush Building, 403 Wapping Street, Frankfort, Ky. 40601; Office of Clerk, Jefferson Circuit Court, Louisville, Ky. 40202; Victor L. Baltzell, Jr., Esq., Connelly, Kaercher, Baltzell & Stamper, 219 Marion E. Taylor Building, Louisville, Ky. 40202; and Mr. Earl J. Hartlage, 4115 Bramers Lane, Louisville, Ky. 40216.

Affiant further states this to be done in compliance with the rules of this Court and knows of no one else entitled to notice or a copy of this brief.

That said service was within the time specified for filing.

Further affiant sayeth not.

L. STANLEY CHAUVIN, JR.

Subscribed and sworn to before me by L. Stanley Chauvin, Jr. this 15th day of December, 1981.

My commission expires September 9, 1985.

Notary Public, State at Large, Ky.

Office - Supreme Court, U.S.
FILED
JAN 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 80-1285

IN THE

SUPREME COURT OF THE UNITED STATES

October, Term 1980

CARL W. BROWN - - - - - Petitioner

vs.

EARL J. HARTLAGE - - - - Respondent

On Writ of Certiorari to the Court of Appeals of Kentucky

REPLY BRIEF FOR PETITIONER, CARL W. BROWN

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IN THE

SUPREME COURT OF THE UNITED STATES

October, Term 1980

No. 80-1285

CARL W. BROWN - - - - - - *Petitioner*

v.

EARL J. HARTLAGE - - - - - *Respondent*

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY

REPLY BRIEF FOR PETITIONER, CARL W. BROWN

The Brief of the Amicus Curiae filed in this action suggests that the Kentucky Court's interpretation of KRS 121.055 does not violate Petitioner's First Amendment right to engage in political speech by promising to serve for less than permitted. This position indicates a basic misunderstanding of this Court's precedents and their meaning and demands a reply.

ARGUMENT

I. The Interpretation of KRS 121.055 Unduly Infringes Upon the First Amendment Right of Political Speech:

The Amicus Curiae concedes that the statement of the Petitioner, that he would serve for less than permitted, was indeed political speech coming under the

umbrella of protection of the First Amendment provided to citizens of the states by the Fourteenth Amendment. Both Petitioner and the Amicus Curiae agree that the Commonwealth of Kentucky has a compelling interest in the electoral process and has the right to regulate in the area. The disagreement occurs over the extent of such regulation.

The Amicus Curiae does not cite any of this Court's long standing precedents as defining the parameters of such regulation. He relys heavily on *United States* v. *O'Brien,* 391 U. S. 367 (1968), as the linchpin of his argument, maintaining that it permits Kentucky to invalidate the Petitioner's election. *United States* v. *O'Brien,* is not a case of interpretation, but a case where the Appellant's constitutional attack was upon that portion of the selective service laws which requires a citizen not to knowingly destroy his registration card. O'Brien argued that the act of destruction was linked to First Amendment speech. In our present circumstance, the attack by Petitioner is upon the Court of Appeals of Kentucky's interpretation of the extent and manner of Kentucky's ability to regulate, not whether a state may regulate under any state of fact. In short the Amicus Curiae bases his argument upon the concept that because Kentucky may regulate the electoral process, ipse dixit, it may regulate all political speech in the form of campaign promises regardless of the intrusion upon fundamental First Amendment rights. This is not consistent with this Court's requirement as to the state's duty in regard to the regulation of citizen

activities coming under the umbrella of the protected rights of the First Amendment.

This Court holds "[t]he power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell* v. *Connecticut*, 310 U. S. 269 (1940).

Where a state statute seeks to regulate in an area impacting fundamental First Amendment rights the regulation sought must be very narrow and subject to exacting judicial scrutiny. *Citizens Against Rent Control, Coalition for Fair Housing, et al., Appellants,* v. *City of Berkley, California, et al.,* —— U. S. ——, 50 U.S.L.W. 4071 (decided December 14, 1981); *Hynes* v. *Mayor of Oradell*, 425 U. S. 610 (1976); *Buckley* v. *Valeo*, 424 U. S. 1 (1976); and *Schad* v. *Borough of Mount Ephraim*, —— U. S. ——, 49 U.S.L.W. 4597 (1981).

KRS 121.055, states in pertinent part:

> "No candidate . . . shall . . . promise . . . things of value to any person in consideration of the vote . . . of that person."

The Courts of Kentucky have refused to narrowly construe this statute so as to prevent unallowable infringement upon First Amendment rights of candidates running for office. The Amicus Curiae does not address this point. The reason for this paucity of analysis is clear. The Kentucky Court of Appeals decision cannot withstand this Court's mandate permitting only the narrowest of intrusion upon First Amendment freedom.

II. The Kentucky Court's Prior Interpretations of KRS 121.055 Did Not Give Guidance to the Petitioner:

The Amicus Curiae firmly takes the position that KRS 121.055 does not suffer from constitutional infirmity due to vagueness because of the Kentucky Court's prior decisions interpreting the statute. He argues that *Sparks* v. *Boggs,* Ky., 339 S. W. 2d 480 (1960) and *Draughn* v. *Martin,* Ky., 350 S. W. 2d 161 (1961) are interpretations of KRS 121.055 by Kentucky Courts which afforded the Petitioner knowledge that his statement was in violation of the statute. As is argued in Petitioner's Brief on the Merits, this argument by the Amicus Curiae is without merit. In *Sparks* v. *Boggs, supra,* the offending candidate promised to serve for One Dollar per annum when the controlling salary limitation statute stated that the Commissioner was to receive an annual salary of not more than $500.00 per annum. The offending candidates offered to give the remaining salary to select groups in the community as a charitable gift. In the matter at hand, Petitioner stated that he would serve for $3,000 less than the permitted $20,000 salary. In effect, Petitioner stated he would serve for $17,000 per year rather than $20,000 per year. KRS 64.530(6) is the only statute which explicitly states the salary a County Commissioner may receive. It mandates that the salary of County Commissioners serving in counties containing a city of the first class[1] shall not exceed $9,600 per annum. Obviously, the Petitioner's statement to

[1]The situs of the City of Louisville is Jefferson County. Louisville is a city of the first class.

serve for $17,000 is not a statement that he would serve for less than the statutory requirement of $9,600 per year. Nor did the Petitioner offer the saving of $3,000 to any select group in the community, as was done in *Sparks*. Accordingly, the *Sparks* rationale does not give guidance to the Petitioner.

The Amicus Curiae also relys upon *Draughn* v. *Martin, supra,* to inform the Petitioner that his statement was a violation of KRS 121.055. *Draughn* v. *Martin* involves a campaign promise by a candidate running for Tax Commissioner, not to tax certain taxable property, if elected. This promise by the offending candidate, as noted by the Courts of Kentucky, was a promise to the electorate not to perform his required statutory duties to tax. Thus the offending candidate offered a dereliction of his statutory duty for the benefit of the general populous. In the case at bar the Petitioner did not promise any dereliction of duty by his statement; but, to the contrary advocated a "pro tanto reduction in taxes," *Sparks* v. *Boggs, supra,* and thus this rationale is equally inapplicable.

Clearly, men of common intelligence could not fathom that the Court of Appeals of Kentucky's prior decisions were the interpretive basis from which to judge their campaign promises. The Petitioner can not be reasonably required to foresee that KRS 121.055 would be construed in such fashion as to hold his campaign promise to serve for less than permitted a violation. Accordingly, the Court of Appeals of Kentucky's prior interpretations cannot be considered to cure the constitutional infirmity of vagueness. Kentucky's

Courts have had the opportunity to cure this constitutional infirmity. Having been given the chance to interpret its own statute the Courts still have not interpreted, for candidates such as Petitioner, the meaning of the term "promise", nor the meaning of the term "things of value". Surely, before KRS 121.055 is applied to Petitioner, Petitioner as well as all other candidates for political office in the Commonwealth of Kentucky, should be given this needed direction. It has not been forthcoming and we are accordingly before this Court.

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This Court posits that the general test of vagueness applies with particular force in review of laws dealing with speech. *Hynes* v. *Mayor of Oradell, supra.* Further, this Court has required that stricter standards of permissible statutory vagueness are to be applied to a statute having a potentially inhibiting effect on speech; and, a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser. *Buckley* v. *Valeo, supra.* Petitioner submits, that the Amicus Curiae's argument that KRS 121.055 does not suffer from vagueness due to the Kentucky Courts' prior decisions interpreting the statutes, is not persuasive.

III. The Amicus Curiae's Argument of Impossibility of Legal Performance:

The Amicus Curiae argues:

> "The Court of Kentucky in interpreting this statute has clearly and unequivocally established

> that candidates are free to say anything not otherwise proscribed by the First Amendment in an election campaign, and that line is crossed only if the act promised is a legal impossibility under the statutes or Constitution of Kentucky. This is a valid distinction." Amicus Curiae Brief, p. 13.

This offends the very purpose of political speech and its protection under the First Amendment. This Court has often noted that one of the major purposes of the First Amendment right of free speech is to afford the free discussion of political and governmental affairs. *Mills* v. *Alabama,* 384 U. S. 214 (1966); *Monitor Patriot Co.* v. *Roy,* 401 U. S. 265 (1971). Clearly, this Court has never delineated the limit of permissible speech and in particular political speech, by the requirement that only those things that are "legally possible" at the time of their pronouncement are due First Amendment protection. Surely, such a standard would freeze in time forever, the status quo of all political and legal discussion. The very essence of the First Amendment is to encourage the free exchange of ideas so that the law may change as does the mores of our society and thus assure our form of government the organic vitality intended by the founding fathers. In reality, all campaign promises to change the legal status quo are legal impossibilities at the time they are made. No individual member of any legislative body is more than a cog. It requires the plurality of the body as a whole to change the status quo. Clearly, the standard offered by the Amicus Curiae cannot pass constitutional muster.

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This argument of the Amicus Curiae also ignores this Court's requirement that before the state may act it make an affirmative showing that there is a clear and present danger to the state's compelling interest in the area in which it seeks to regulate. *Edwards* v. *South Carolina,* 372 U. S. 229 (1963) and *Thomas* v. *Collins,* 323 U. S. 516 (1945). The Amicus Curiae does not address the clear and present danger test. As noted in Petitioner's Brief on the Merits and in the Petitioner's Writ of Certiorari, the Petitioner retracted his statement to serve for less than the permissible salary on August 19, 1979, some 4 days after it was made. The statement to serve for less and the retraction were both made considerably prior in time to the election held on November 6, 1979. Never again did the Petitioner state he would reduce his salary and his running mate, Dr. William Creech, who had made this same statement and retraction simultaneously with Petitioner, was defeated. Clearly, the Petitioner's statement could not have had any effect upon the outcome of the election. This was so found by the trial court. (J.A., 25). Before a compelling interest of the state may be invoked the state must show that there was a clear and present danger to this compelling interest. See *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *Herndon* v. *Lowry,* 301 U. S. 242 (1937); and *Communist Party of Indiana* v. *Whitcomb,* 414 U. S. 441 (1974).

Assuming arguendo, that Petitioner's statement is a violation of KRS 121.055 at the time of its utterance, the retraction and defeat of Petitioner's running mate clearly establishes that Petitioner's campaign state-

ment did not effect the outcome of the election. Thus, there can be no clear and present danger to the state's compelling interest in governing its electoral process. We think the lack of discussion by the Amicus Curiae of the retraction and the election results in regard to the Petitioner's running mate speaks for itself. This Court mandates a showing that the state's compelling state interest has been offended. No such showing has been made in this matter. Thus the standard of strict liability for such political advocacy as argued by the Amicus Curiae is constitutionally infirm.

IV. The Amicus Curiae's Representation of the Noncriminal Nature of KRS 121.055 Is in Error:

The Amicus Curiae argues:

> "This is a noncriminal statute and at worst, the Petitioner would be called upon to again submit himself to the voters without the promise of legally impossible acts to the electorate's verdict." Amicus Curiae Brief, pp. 7 and 8.

This argument is factually and legally incorrect. KRS 121.990(8) states specifically:

> "Any person who violates any of the provisions of KRS 121.055 shall be fined not more than Five Thousand Dollars ($5,000) or imprisoned in the county jail for not more than 6 months, or both."

As the above statute clearly indicates violation of KRS 121.055 does expose the actor to criminal penalties. To be sure, in the matter at bar, no criminal sanction

was sought against Petitioner. However, contrary to the Amicus Curiae's argument, the criminal or non-criminal nature of a statute has no effect upon whether or not the Petitioner is entitled to the protection of the First Amendment. Clearly, the application of the First Amendment to any citizen's rights does not depend on his being subject to criminal sanctions.

CONCLUSION

For each and all of the foregoing reasons and discussion, the Petitioner renews his argument that the judgment of the Court of Appeals of Kentucky should be reversed, and the mandate of this Court should issue directing that Petitioner's election is valid.

Respectfully submitted,

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STATUTORY APPENDIX

121.055. Candidates prohibited from making expenditure, loan, promise agreement or contract as to action when elected, in consideration for vote.—No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contract with any person to vote for or support any particular individual, thing or measure, in consideration for the vote or the financial or moral support of that person in any election, primary or nominating convention, and no person shall require that any candidate make such a promise, agreement or contract. (Enact. Acts 1974, ch. 130, § 182; 1980, ch. 292, § 3, effective July 15, 1980.)

64.530. Compensation of county officers and employes, and members of fiscal court.—(1) Except as provided in subsection (5) and (6) of this section, the fiscal court of each county shall fix the compensation of every county officer and employe except the officers named in KRS 64.535 and the county attorney. The fiscal court may provide a salary for the county attorney.

(2) For the purposes of this section, justices of the peace and constables in all counties shall be deemed to be county officers and deputies or assistants of county officers shall be deemed to be county employes, but employes of county boards or commissions which are now authorized by law to fix the compensation of their employes shall not be deemed to be county employes for the purposes of this section.

(3) In the case of officers compensated from fees, or partly from fees and partly by salary, the fiscal court shall fix the maximum compensation that any officer except the

officers named in KRS 64.535 may receive from both sources. The fiscal court may also fix the number of deputies and assistants, and, the compensation thereof, and the maximum amount that the officer may expend each year for expenses of his office.

(4) In the case of county officers elected by popular vote and the county attorney, in the event the fiscal court provides him a salary, the monthly compensation of the officer and of his deputies and assistants shall be fixed by the fiscal court not later than the first Monday in May in the year in which the officers are elected, and the compensation of the officer shall not be changed during the term but the compensation of his deputies or assistants may be reviewed and adjusted by the fiscal court not later than the first Monday in May of any successive year upon the written request of the officer. On or before August 1, 1966, the fiscal court shall fix the salary provided herein for the county attorneys for the term commencing in January, 1966, notwithstanding any other provisions of this section which may be inconsistent herewith.

(5) Nothing in this section shall apply to property valuation administrators or their deputies, assistants and expenses, in any county, or to the circuit court clerk, county clerk, sheriff, jailer, and their deputies, assistants and expenses, in counties having a population of seventy-five thousand (75,000) or more.

(6) Justices of the peace serving on a fiscal court in any county, and county commissioners serving on a fiscal court in any county other than one (1) containing a city of the first, second, third or fourth class, shall be paid for their services, out of the county treasury, not to exceed the maximum compensation allowable under KRS 64.527. The fiscal court shall fix the amount to be received within the above limit, but no change of compensation shall be effective as to any member of a fiscal court during his term

of office. The compensation of county commissioners serving on fiscal courts in counties containing a city of the first class shall not exceed nine thousand six hundred dollars ($9,600) per year, in counties containing cities of the second class it shall not exceed nine thousand dollars ($9,000) per year and in counties containing cities of the the third or fourth class it shall not exceed twenty percent (20%) more than the annual compensation paid in the county for the calendar year immediately preceding 1974, and all of said annual salaries shall be payable monthly. Justices of the peace and county commissioners shall not receive any compensation for their services on the fiscal court, other than as provided by this section; nor shall they receive any compensation for serving on committees of the fiscal court. The fiscal court shall fix the amount to be received within the above limit, but no change of compensation except as provided in KRS 64.285 shall be effective as to any member of a fiscal court during his term of office. (Enact. Acts 1950, ch. 123, § 9; 1956, ch. 144; 1958, ch. 126, § 2; 1962, ch. 214, § 1; 1964, ch. 109, § 3; 1966, ch. 15, § 2; 1966, ch. 255, § 75; 1968, ch. 152, § 33; 1970, ch. 203, § 1; 1972, ch. 30, § 1; 1972, ch. 203, § 5; 1972, ch. 358, § 1; 1974, ch. 60, § 2; 1974, ch. 254, § 4; 1976, ch. 306, § 1; 1976 (Ex. Sess.), ch. 17, § 20, effective January 1, 1978; 1976 (Ex. Sess.), ch. 14, § 40, effective January 2, 1978; 1978, ch. 196, § 1, effective June 17, 1978; 1978, ch. 384, § 131, effective June 17, 1978.)

121.990. Penalties.—(Irrelevant Sections omitted.)

(8) Any person who wilfully violates any of the provisions of KRS 121.055 shall be fined not more than five thousand dollars ($5,000), or imprisoned in the county jail for not more than six (6) months, or both.